

17-2426

United States Court of Appeals
for the Second Circuit

26 CROWN STREET ASSOCIATES, LLC, 26 CROWN
MASTER TENANT, LLC, PMC PROPERTY GROUP,
INC.,

Plaintiffs-Appellants,

against

GREATER NEW HAVEN REGIONAL WATER
POLLUTION CONTROL AUTHORITY, CITY OF NEW
HAVEN,

Defendants-Appellees.

On Appeal from the United States District Court
for Connecticut (New Haven)

**BRIEF FOR AMICI CURIAE CITY OF NEW YORK AND OTHER
MUNICIPALITIES, PUBLIC WASTEWATER UTILITIES, AND NATIONAL
AND REGIONAL ASSOCIATIONS OF MUNICIPALITIES AND UTILITIES
IN SUPPORT OF DEFENDANTS-APPELLEES TO AFFIRM THE
DISTRICT COURT'S DECISION**

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amici represent that no parent corporation(s) or publicly held corporation(s) own 10% or more of the stock in any Amici.

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RULE 29(A) CONSENT TO FILING

Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, Amici Curiae have obtained the consent of all parties to file this brief. The parties consented as follows:

Plaintiffs-Appellants 26 Crown Street Associates, LLC, 26 Crown Master Tenant, LLC, and PMC Property Group, Inc. consent to the filing of this amicus brief on the condition that Amici inform the Court that Appellants have not agreed with the Amici's legal arguments;

Defendants-Appellees Greater New Haven Regional Water Pollution Control Authority and City of New Haven consent to the filing.

INTEREST OF AMICI CURIAE¹

Wastewater utilities provide services that are essential to protecting public health and the environment; regulatory certainty is necessary to allow utilities to make and plan prudently for investments of public funds. The Amici municipalities and public wastewater

¹ Pursuant to FRAP 29(a)(4)(E) and Local Rule 29.1(b), Amici state: counsel for Amici authored this brief in its entirety, and no person or entity other than Amici and their representatives made any monetary contribution to the preparation or submission of this brief.

utilities, and associations that represent them, submit this brief in support of Defendants-Appellees Greater New Haven Regional Water Pollution Control Authority and City of New Haven based on their compelling interest in ensuring that the National Pollutant Discharge Elimination System (“NPDES”) permitting scheme, and attendant Clean Water Act liability, remains predictable and lawfully within the scope of the Act.

Amici municipalities and public utilities operate publicly owned sewage treatment works (“POTWs”) that are subject to stringent NPDES permit requirements for discharges from POTWs to surface waters. These permits include limits on the pollutants in those discharges to meet water quality standards in the receiving waters.

Amici also operate the collection systems that convey wastewater to the POTWs. Many of these collection systems include “combined sewers,” which convey both wastewater and stormwater. NPDES permits generally require utilities to properly operate and maintain their systems to achieve discharge limitations, and explicitly authorize discharges of mixed stormwater and sewage during wet weather via

combined sewer overflows (“CSOs”). Meeting these permit requirements involves billions of dollars of investment from taxpayers and ratepayers.

A variety of factors can cause backups, many of which are beyond the scope of normal system maintenance. When the volume of wastewater exceeds the system’s capacity due to periods of heavy rainfall or snow melt, untreated wastewater can be discharged directly into basements; this is exacerbated by aging infrastructure and increasingly frequent severe storms. Moreover, clogs or blockages in a sewer line resulting in basement backups can be caused by items flushed down the toilet or washed down the drain, and by tree roots, grease, and other obstructions. Such blockages can occur in either a public main sewer line or in a private sewer service line, which the property owner owns and maintains. Wastewater utilities strive to prevent sewer backups onto private property through system maintenance, infrastructure improvements, community education and enforcement of rules prohibiting discharges of substances likely to cause obstructions. Yet even with these efforts, backups may still occur.

Amici seek to provide this Court with the perspective that subjecting backflow to basements to independent Clean Water Act

("CWA") jurisdiction is not only contrary to law, but unmanageable. Such an unwarranted expansion of CWA jurisdiction could have broad implications for Amici utilities' ability to run their systems to best protect public health and the natural environment while meeting all applicable CWA and other legal requirements. Under the scheme propounded by Plaintiffs-Appellants, Amici could be forced to address each potential backflow location, rather than investing limited municipal and public utility resources on prioritized improvements that will provide the greatest benefits.

Amici's specific interests are summarized as follows:

The City of New York, a political subdivision of the State of New York, is the largest municipal water and wastewater utility in the country. The City's Department of Environmental Protection ("DEP") treats roughly 1.3 billion gallons of wastewater a day and supplies and distributes more than one billion gallons of drinking water each day to over nine million people. To meet these demands and ensure compliance with all legal requirements, including the CWA, the DEP's nearly 6,000 employees operate and maintain an extensive source water protection program; a world-renowned water supply system; and a wastewater

system comprised of 7,400 miles of sewers, 96 pump stations, four CSO detention facilities, and 14 in-City wastewater treatment plants. Despite considerable investment, and a program to reduce such instances, the City's system occasionally produces sewage backflows into building basements.

The National Association of Clean Water Agencies ("NACWA") is a not-for-profit trade association representing the interests of publicly owned wastewater and stormwater utilities across the United States. NACWA's members include nearly 300 municipal clean water agencies that own, operate, and manage POTWs, storm sewer systems, water reclamation districts, and all aspects of wastewater collection, treatment, and discharge.

The National League of Cities ("NLC") is the country's largest and oldest organization serving municipal governments and represents more than 19,000 U.S. cities, towns and villages. Many of NLC's members provide water and wastewater services. NLC advocates on behalf of municipalities on critical issues that affect local governments and warrant action.

Central Davis Sewer District, a 10 million gallon per day (“MGD”) annual capacity utility, is an award-winning, publicly-owned collection system and treatment plant serving the Farmington, Fruit Heights and Kaysville, Utah, areas and discharging onto the shores of the Great Salt Lake. First created in 1961, the District produces 1,350 tons of compost annually, land applies 290 tons annually, farms 130 acres, and has 160 miles of pipes.

The District of Columbia Water and Sewer Authority (“DC Water”) is an independent authority of the District of Columbia government that serves over 680,000 residents and 17.8 million annual visitors in the District by collecting and treating wastewater. DC Water also provides wastewater treatment services for 1.6 million people in Maryland and Virginia. To collect and transmit wastewater, DC Water operates 1,900 miles of sanitary and combined sewers, 22 flow-metering stations, and nine off-site wastewater pumping stations. Occasionally, DC Water’s wastewater system experiences backups into building basements due to clogged building sewer laterals, illegal discharges of fats oils and grease, tree roots, and other illicit discharges. To treat wastewater, DC Water operates the Blue Plains Advanced Wastewater

Treatment Plant (the “Plant”), the largest advanced wastewater treatment facility in the world, and is expending \$2.7 billion dollars of ratepayer funds to implement its Clean Rivers Project, upgrading the Plant and the District’s combined sewer system to reduce CSO discharges.

The City of Lowell, Massachusetts, through its Lowell Regional Wastewater Utility, operates a wastewater system that is designed to transport, treat, and dispose of wastewater, stormwater, and domestic septage from the City of Lowell and the surrounding towns of Chelmsford, Dracut, Tewksbury, and Tyngsborough. That system includes the Duck Island Wastewater Treatment Facility. The collection systems comprise over 250 miles of sewerage and drainage piping and include nine diversion stations and thirteen pump stations that are located throughout the city. The City actively addresses sewer and drainage backups, and has an ongoing program to inspect the collection systems’ many miles of pipes. The City’s program includes substantial, costly efforts to control and reduce both CSOs and Sanitary Sewer Overflows.

The Louisville and Jefferson County Metropolitan Sewer District (“MSD”) is a public body corporate and political subdivision created and established pursuant to Kentucky State law for the purpose of providing adequate sewer and drainage facilities. MSD operates and maintains a collection, transmission and treatment system that includes more than 3,300 miles of sewer lines, 259 pumping stations, five general regional water quality treatment centers and thousands of sanitary and combined sewer manholes and catch basins. MSD serves over 250,000 customers (residents, businesses and industries) in its service area, which consists of approximately 385 square miles. Sporadically, MSD’s customers may experience backups into their homes or buildings due to sewer obstructions that result from illegal discharge of fats, oils and grease, tree roots and other illicit discharges.

The County of Maui, a political subdivision of the State of Hawaii, is comprised of the islands of Maui, Molokai, Lanai, and Kahoolawe. The County’s five wastewater reclamation facilities treat approximately 14 MGD of wastewater. On the island of Lanai, 100 percent of the recycled water is land applied; system-wide, the County’s average annual recycled water use is 30 percent with excess recycled water

disposed of via deep injection wells. Due to a variety of circumstances, the County of Maui experiences sewer backups onto private property from time-to-time.

The Metro Wastewater Reclamation District, a political subdivision of the State of Colorado, provides wastewater services to approximately 1.8 million people across a 715-square mile service area that spans much of the metropolitan Denver area. The Metro Wastewater Reclamation District owns and operates two wastewater treatment plants which collectively treat an average of 135 MGD of wastewater, with the capacity to treat up to 248 MGD. The mission of the Metro Wastewater Reclamation District is to protect the region's health and environment by cleaning water and recovering resources and executes this mission through resource stewardship, infrastructure management, process optimization, and regulatory engagement and compliance.

The Narragansett Bay Commission owns and operates the two largest wastewater treatment facilities in Rhode Island: the Field's Point Wastewater Treatment Facility in Providence and the Bucklin Point Wastewater Treatment Facility in East Providence, serving all or

part of ten cities and towns in metropolitan Providence and the Blackstone Valley. The Commission owns 110 miles of interceptors and four miles of deep rock CSO tunnel and associated conduits, and treats over 30 billion gallons of wastewater every year. Established in 1980 by state law, the Commission has 250 employees. Repeatedly recognized for its commitment to improving water quality, robust scientific monitoring, renewable energy, and fiscal excellence, the Commission has been named a *Utility of the Future* and has won *Excellence in Management* designations from NACWA, *Best Places to Work* awards from the Providence Business News, and numerous awards from the Government Finance Officer Association.

The City and County of San Francisco, a political subdivision of the State of California, provides water and wastewater services to San Francisco and neighboring communities. The City's San Francisco Public Utilities Commission treats roughly 65 MGD of wastewater and, as a public water utility, supplies and distributes more than 180 million gallons of drinking water each day to over 2.7 million people. San Francisco's wastewater services include municipal sewage and rainwater collection systems, treatment plants and disposal facilities.

The San Francisco Public Utilities Commission is actively engaged in ensuring that it complies with all regulatory requirements, including those under the CWA, and in developing substantial capital improvement plans to assist the City in maintaining the reliability and high quality of the services it provides.

The City of Tacoma, a political subdivision of the State of Washington, is the third largest city in the State with a population of 198,000 people. Tacoma's sewer system is separated into two utilities, the wastewater and surface water utilities. The City's wastewater utility operates and maintains two wastewater treatment plants, 45 pumping stations and more than 700 miles of sewer pipe serving over 90,000 customer accounts. The treatment plants clean about 10 billion gallons of wastewater each year ensuring that only clean water is released into Commencement Bay. The City's surface water utility maintains more than 500 miles of public storm water pipe, 22,000 storm drains (catch basins), four pump stations and numerous detention ponds/structures. The Utilities jointly operate the Center for Urban waters, a joint venture between the Puget Sound Partnership, the University of Washington, and the City of Tacoma, whose mission is to

protect the Puget Sound and Commencement Bay through research and implementation of water quality initiatives as well as community and public education and outreach.

The City of Worcester, a political subdivision of the State of Massachusetts, is the second largest city in New England. Worcester's water infrastructure serves approximately 250,000 people in the City and surrounding towns. The Worcester sewer system includes 365 miles of sanitary sewer, 55 miles of combined sewer, 330 miles of surface drain, 32 pumping stations and a CSO treatment facility. Wastewater is treated at the regional Upper Blackstone Water Pollution Abatement District ("UBWPAD") which receives 85 percent of both its flow and operating revenue from Worcester. Portions of Worcester's sewer system in use today were constructed in the mid-1800s. Despite millions of dollars in annual capital expenditures to repair, replace and upgrade sewer system components, sewer blockages and collapses do occur and may lead to basement backups and sanitary sewer overflows. Worcester is currently subject to CWA NPDES permitting for CSOs, stormwater, drinking water treatment plant filter backwash and wastewater treatment plant discharge via UBWPAD.

The Association of Missouri Cleanwater Agencies (“AMCA”) is a statewide association of 22 public water/sewer/stormwater utilities representing a significant majority of the sewered population of Missouri. AMCA strives to achieve environmentally responsible solutions to urban wet weather water quality issues in an affordable and cost-effective manner.

The Association of Ohio Metropolitan Wastewater Agencies (“AOMWA”) is a statewide organization that represents the interests of Ohio’s public wastewater treatment agencies. Its members include 20 large- and medium-size public utilities that construct, operate, maintain and manage public sewer collection and treatment systems throughout Ohio. Collectively, AOMWA’s members successfully treat more than 300 billion gallons of wastewater each year for more than 4 million Ohioans. AOMWA’s and its members’ fundamental purpose is to protect the water resources on which Ohio’s communities depend. Consistent with its important public role, AOMWA appears before state and federal courts to advocate on behalf of its members on issues impacting their ability to deliver efficient and cost-effective wastewater collection and treatment services to Ohio’s residents and businesses.

The California Association of Sanitation Agencies (“CASA”) is a nonprofit mutual benefit corporation organized and existing under the laws of the State of California. CASA is comprised of more than 110 local public agencies throughout California, including cities, sanitation districts, sanitary districts, community services districts, sewer districts, county water districts, water districts, and municipal utility districts. CASA’s member agencies provide wastewater collection, treatment, water recycling, renewable energy, and biosolids management services to millions of California residents, businesses, industries, and institutions.

The Maryland Association of Municipal Wastewater Agencies (“MAMWA”) is a Maryland non-profit corporation comprising 23 local governments, commissions, wastewater authorities, and districts that own and operate wastewater treatment plants throughout Maryland. MAMWA’s membership serves approximately 95 percent of Maryland’s sewer population, as well as business and industry throughout the State. For over 20 years, MAMWA has worked to ensure that federal and state water quality programs are scientifically robust, affordable, and cost-effective.

The Massachusetts Coalition for Water Resources Stewardship (“MCWRS”) is a non-profit organization representing the interests of municipalities in Massachusetts within the world of water infrastructure. MCWRS members include over 30 municipalities and districts which own and operate wastewater, stormwater and drinking water systems for public benefit. While they continually invest in capital improvements, the municipalities and districts are also burdened by unfunded regulatory demands which often divert finances from the most pressing local needs to those with much less obvious benefits. MCWRS advocates on their behalf for the use of sound science, fiscal responsibility and a cost-beneficial approach to water resources management.

The Neuse River Compliance Association (“NRCA”), a 501(c)(3) not-for-profit corporation, is comprised of local government and private corporations that hold major NPDES discharge permits into the Neuse River basin. The local governments also hold state issued permits to operate sewage collection systems. The NRCA was formed to comply with the Neuse Management Strategy implemented in 1998 to control nitrogen delivered to the Neuse Estuary, within the Neuse River basin,

by point and nonpoint sources. The NRCA has invested over \$400 million in facility improvements to meet and exceed the required nitrogen reductions. The impaired waters are not improved despite these reductions and the local governments are confronted with the potential for future extremely expensive additional nitrogen reduction requirements and need to conserve resources for that anticipated financial burden on their consumers.

The New England Water Environment Association (“NEWEA”) is a dynamic 501(c)(3) organization of over 2400 highly qualified and motivated water and wastewater professionals located throughout New England, who volunteer their time, energy, and expertise in order to preserve, protect, and manage one of our most precious resources here in New England, our water environment. Our members contribute to “the friendly exchange of information and experience.” NEWEA’s mission is to promote education and collaboration while advancing knowledge, innovation, and sound public policy for the protection of the water environment and our quality of life. NEWEA is a not-for-profit professional member association.

The New York Water Environment Association (“NYWEA”) was founded in 1929 by professionals in the field of water quality as a nonprofit educational organization, and has over 2,500 members statewide who historically have helped lead the way for state and national clean water programs. NYWEA promotes sustainable clean water quality management through science, education, and training, and has a mission to educate and assist those involved in the water environment industry in New York State. NYWEA administers the State’s wastewater operator certification program, and its members include technical and policy experts willing to offer objective scientific information and facts regarding environmental legislation.

The North Carolina Water Quality Association, Inc. (“NCWQA”) is a statewide association of 39 public water, sewer, and storm water utilities throughout North Carolina, serving a significant majority of the sewer population in the state. Its primary purpose is to ensure that federal and state water quality programs are based on sound science and regulatory policy so that its members can protect public health and the environment in the most affordable and cost-effective manner possible.

The South Carolina Water Quality Association, Inc. (“SCWQA”), is a statewide association of 33 publicly-owned sewer utilities. Its primary purpose is to ensure that federal and state water quality programs are based on sound science and regulatory policy so that its members can protect public health and the environment in the most affordable and cost-effective manner possible.

The Virginia Association of Municipal Wastewater Agencies (“VAMWA”) is a Virginia non-profit corporation comprising 64 local governments, wastewater authorities, and districts that own and operate wastewater treatment plants throughout Virginia. VAMWA’s membership serves approximately 95 percent of Virginia’s sewered population, as well as business and industry throughout the Commonwealth. For over 20 years, VAMWA has worked to ensure that federal and state water quality programs are scientifically robust, affordable, and cost-effective.

The West Virginia Municipal Water Quality Association, Inc. (“WVMWQA”) is a statewide association of 26 owners and operators of POTWs. Its primary purpose is to ensure that state and federal water quality programs are based on sound science and regulatory policy so

that its members can protect public health and the environment in the most affordable and cost-effective manner possible.

The Wet Weather Partnership (“WWP”) is an association of communities with combined sewer systems, similar to the City of New Haven, from across the country. The WWP seeks environmentally responsible solutions to all urban wet weather issues in a fiscally prudent manner. It is dedicated to ensuring that federal and state water quality regulatory programs are scientifically based, affordable, and cost-effective. Like virtually all other wastewater utilities, all of the WWP member utilities experience sewer backups onto private property, from time-to-time, due to a variety of circumstances.

The WaterReuse Association is a not-for-profit trade association representing the interests of POTWs, community water systems, businesses, and non-governmental organizations that engage and/or are interested in water recycling. Water recycling includes the treatment, discharge and reclamation of wastewater effluent through underground aquifers for use as potable or non-potable water supply.

SUMMARY OF THE ARGUMENT

The District Court rightly rejected Plaintiffs-Appellants' claim that wastewater backflow from the New Haven wastewater collection system into their basements violates the Clean Water Act ("CWA" or "Act"), 33 U.S.C. §§ 1251 *et seq.* The CWA prohibits the addition of pollutants from a "point source" to "waters of the United States" except as authorized by a National Pollutant Discharge Elimination System ("NPDES") permit. 33 U.S.C. §§ 1311(a), 1342(a), 1362(7), (12). As the District Court correctly recognized, and Plaintiffs-Appellants do not contest, backflow into basements is not a regulated discharge itself, even if cracks in the basement foundation allow sewage from backflows to enter the soil beneath and "eventually work[] their way to the water table beneath the properties," as the basements themselves are not waters of the United States. *See* Second Amended Complaint, ¶ 28.

This Court should also reject Plaintiffs-Appellants' attempt to mischaracterize any addition of wastewater from their basements into the groundwater as prohibited by the CWA. As explained below, groundwater is not a point source since it is not a "discernible, confined and discrete conveyance"; nor is groundwater a water of the United

States as a matter of law. Likewise, the hydrologic connection theory of liability advanced by Plaintiffs-Appellants and potential Amici Waterkeeper Alliance *et al.*² is contrary to the Act's text, structure, and legislative history. The rigorous NPDES permitting requirements of the CWA, and broad attendant liability for failing to seek a permit, are appropriately reserved for point source discharges, not the diffuse migration of pollutants through groundwater alleged here. Any wastewater that may enter soil and groundwater from cracks in a basement is beyond the scope of CWA liability and permitting requirements even if it eventually reaches surface waters.

ARGUMENT

PLAINTIFFS-APPELLANTS' ALLEGATIONS ARE INSUFFICIENT TO STATE A CLAIM UNDER THE CWA

The CWA prohibits the “discharge of any pollutant” unless it complies with the statute. 33 U.S.C. § 1311(a). The CWA defines discharge of a pollutant as “any addition of any pollutant to navigable waters from any point source.” *Id.* § 1362(12). Thus, to come within the

² See Brief of Amici Curiae Waterkeeper Alliance, Peconic Baykeeper, Soundkeeper, Connecticut Fund for the Environment, and Conservation Law Foundation Not In Support of Any Party and to Reverse Or, In the Alternative, Affirm On Other Grounds the District Court's Decision (“Waterkeeper Brief”) at 6.

scope of the CWA, a discharge must meet two core requirements: the discharge must be (1) from a *point source*, defined as “any discernible, confined and discrete conveyance,” and (2) to *navigable waters*, defined as “waters of the United States.” *Id.* §§ 1362(7), (14). Here, as the District Court correctly found, Plaintiffs-Appellants’ allegations about backflow into their basement do not plausibly meet these two requirements and do not establish a discharge of pollutants that could give rise to a claim under the CWA either directly or under a hydrologic connection theory.

POINT I

GROUNDWATER IS NOT A DISCERNIBLE, CONFINED AND DISCRETE CONVEYANCE AND, AS SUCH, CANNOT BE A POINT SOURCE

The Supreme Court has recognized that the release of pollutants from a point source 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. *Rapanos v. United States*, 547 U.S. 715, 743 (2006) (quoting *United States v. Velsicol Chemical Corp.*, 438

F. Supp. 945, 946-47 (W.D. Tenn. 1976)) (each case cited in *Rapanos* concerned an indirect discharge of pollutants to navigable waters through one or more subsequent point sources). Pollutants must still enter navigable waters by means of a discernible, confined and discrete conveyance to come within Section 301(a) of the Act. *Sierra Club v. BNSF Ry. Co.*, No. C13-967-JCC, 2016 U.S. Dist. LEXIS 147786 at *25-26 (W.D. Wash. Oct. 25, 2016) (the alleged point source must actually convey the pollutant).

As the District Court correctly found, the “diffuse medium” of groundwater cannot plausibly be a “point source.” *26 Crown Assoc., LLC v. Greater New Haven Reg’l Water Pollution Control Auth.*, 2017 U.S. Dist. LEXIS 106989, *21-22 (D. Conn. July 11, 2017). The CWA defines point source as:

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.

33 U.S.C. § 1362(14) (emphasis added). While noting that “the ‘definition of a point source is to be broadly interpreted’ . . . ,” this Court has emphasized that, “discernible, confined and discrete conveyance’

cannot be interpreted so broadly as to read the point source requirement out of the statute.” *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 219 (2d Cir. 2009) (quoting *Dague v. City of Burlington*, 935 F.2d 1343, 1354-55 (2d Cir. 1991) *rev’d on other grounds* 505 U.S. 557 (1992)); *United States v. Plaza Health Lab., Inc.*, 3 F.3d 643, 646 (2d Cir. 1993). Finding that the groundwater *itself* is a discernible, confined and discrete conveyance erases any meaning of the definition of point source and limitations from it, and is contrary to the instruction by this Court.

District courts in the Second Circuit have declined to define point sources so broadly that they no longer resemble the types of conveyances described in the statutory definition. In *Hudson Riverkeeper Fund v. Harbor at Hastings Associates*, the Southern District of New York considered a claim that the trash and rainwater entering a river from a building on an industrial site constituted discharge of a pollutant from a point source. 917 F. Supp. 251, 253, 257 (S.D.N.Y. 1996). The court looked to *Plaza Health Lab’s* statement that “the words use to define the term [point source] and the examples given (‘pipe, ditch’ . . . etc.) evoke image of physical structures and

instrumentalities that systematically act as a means of conveying pollutants” in correctly holding that the building was not a point source. *Id.* at 257 (quoting *Plaza Health Lab.*, 3 F.3d at 646); *see also United States EPA ex rel. McKeown v. Port Auth.*, 162 F. Supp. 2d 173, 189 (S.D.N.Y. 2001) (rejecting a claim that toll booths were point sources for vehicle tailpipe emission collected in the area due to the toll booths’ presence there).

Similarly, here, the groundwater beneath Plaintiffs-Appellants’ basements is not a point source “channel” as Plaintiffs-Appellants argue. *See Cordiano*, 575 F.3d at 219. As the District Court correctly held, it is “basic science” that groundwater “is widely diffused by saturation within the crevices of underground rocks and soil.” *26 Crown Assoc.*, 2017 U.S. Dist. LEXIS 106989, *21. Pollutants that may travel through groundwater are accordingly nonpoint source pollution and not addressed by the Act. *See Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 2017 U.S. Dist. LEXIS 85053, at *10-11 (D.S.C. Apr. 20, 2017) (“The migration of pollutants through soil and groundwater is nonpoint source pollution that is not within the purview of the CWA.”); *Tri-Realty Co. v. Ursinus Coll.*, No. 11-5885, 2013 U.S. Dist. LEXIS

165471, at *8 (E.D. Pa. Nov. 21, 2013) (“Diffuse downgradient migration of pollutants on top of or through soil and groundwater . . . is nonpoint source pollution outside the purview of the CWA”).

To hold that the ordinary diffuse groundwater here is a point source because it was alleged to be a channel to the Long Island Sound would read the “defined, discrete conveyance” requirement out of the CWA, eliminating any statutory distinction between point and nonpoint sources and undermining Congress’ decision to leave the regulation of groundwater to local control.

POINT II

GROUNDWATER IS NOT A WATER OF THE UNITED STATES

Groundwater is not a water of the United States as a matter of law. As the District Court correctly found, Plaintiffs-Appellants’ allegations that the groundwater beneath their basements constitute waters of the United States is beyond plausible. Environmental Protection Agency (“EPA”) and U.S. Army Corps of Engineers (“Corps”) regulations do not include groundwater in the definition of waters of the United States. 40 C.F.R. § 230.3(o)(2)(v); 33 C.F.R. § 328.3(b)(5). Moreover, Circuit Courts that have considered whether groundwater

could be waters of the United States have rejected those claims. *See Rice v. Harken Exploration Co.*, 250 F.3d 264, 269-70 (5th Cir. 2001); *Vill. of Oconomocwoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 964-65 (7th Cir. 1994) (The CWA does not “assert[] authority over ground waters”).

Courts have struggled with deciding the limits of waters of the United States, but that has been in the context of the categories of surface waters that EPA and the Corps identified in their regulations as being waters of the United States. *See Rapanos* (adjacent wetlands); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159 (2001) (intrastate ponds); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) (abutting wetlands). Groundwater is categorically different from the surface waters at issue in these cases.

Plaintiffs-Appellants’ argument that Justice Kennedy’s fact-specific “significant nexus” test from *Rapanos* should apply to this case misses the mark. First, the text of the Act is clear that groundwater is not a water of the United States. *See Vill. of Oconomocwoc Lake*, 24 F.3d at 966 (J. Mannion, concurring) (action by Congress necessary to include groundwater as water of the United States; “would take more

than a simple amendment of regulations” by EPA). Next, because EPA’s and the Corps’ regulations do not include groundwater in their definition, there are *no* facts that would support a finding that groundwater is a water of the United States. *See San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 707 (9th Cir. 2007) (“not permissible to conclude . . . that a *court* is authorized to conclude, when the administering agencies have reasonably ruled to the contrary, that other non-navigable bodies of water, which are not wetlands, are waters of the United States” based on their relationship to such waters) (emphasis in original).

POINT III

ALLEGATIONS THAT THE GROUNDWATER HAS A HYDROLOGICAL CONNECTION TO WATERS OF THE UNITED STATES ARE NOT SUFFICIENT TO FIND A CWA VIOLATION

Plaintiffs-Appellants try nonetheless to bring the backflows of wastewater into their basements within the scope of the CWA by arguing that leaks from their basements that reach the groundwater below fall under the Act’s jurisdiction, based on the groundwater’s alleged hydrological connection to the Long Island Sound. They suggest that this hydrological connection, which could allow pollutants to reach

waters of the U.S., is sufficient to establish a discharge of pollutants within the meaning of the CWA. Their theory is contrary to the Act's text, framework, and legislative history, and this Court should reject it.

A. Alleging a Hydrological Connection to Waters of the United States Does Not Extend the CWA's Reach to Include Purported Discharges to Groundwater

Plaintiffs-Appellants allege that a hydrological connection between groundwater and surface water is sufficient to confer CWA jurisdiction because of the groundwater's potential effects on the surface water. Brief of Plaintiffs-Appellants at 42-43. The District Court correctly rejected this argument because "the passive migration of pollutants" through "a diffuse medium like ground water" is nonpoint source pollution beyond the jurisdiction of the CWA. *26 Crown Assoc.*, 2017 U.S. Dist. LEXIS 106989, *21-22. This is the case "even though non-point-source pollution is a major contributor to the pollution of the nation's navigable waterways." *Id.* The allegation that pollutants may enter groundwater through cracks in basements that may eventually reach a waterbody is exactly the type of diffuse nonpoint source pollution that was intentionally left beyond the scope of the CWA. *See Or. Nat. Res. Council v. U.S. Forest Serv.*, 834 F.2d 842, 849 (9th Cir.

1987) (“Nonpoint sources, because of their very nature, are not regulated under the NPDES.”).

This Court should affirm the District Court’s refusal to extend—CWA jurisdiction—in order to address a source of pollution not covered by the Act—beyond what is supported by the operative language of the statute. *See Cordiano*, 575 F.3d at 218 (“Our construction of the CWA ‘begins with [the] statutory text and its plain meaning.’” (quoting *Bonime v. Avaya, Inc.*, 547 F.3d 497, 503 (2d Cir. 2008))).

The CWA’s legislative history makes it clear that Congress intentionally left the regulation of discharges to groundwater to local control. Although the EPA administrator sought authority to regulate groundwater because polluted groundwater could impact surface water, both the Senate and the House instead rejected proposals for the CWA to regulate groundwater.

Specifically, EPA requested authority over groundwater to “maintain 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): Hearing before the Comm. on Pub. Works*, 92 Cong. 230

(1971) (statement of Hon. William Ruckelshaus, Administrator, Environmental Protection Agency). But, as courts have emphasized, Congress rejected amendments that would have “provided authority to establish Federally approved standards for groundwaters which permeate rock, soil and other surface formations” because “the jurisdiction regarding groundwaters is so complex and varied from State to State.” *See, e.g., Exxon Corp. v. Train*, 554 F.2d 1310, 1325-29 (5th Cir. 1977) (describing the legislative history); S. Rep. No. 92-414, at 73 (1971), *reprinted in* S. Comm. on Public Works, 93rd Cong., Legislative History of the Water Pollution Control Act Amendments of 1972, at 1491 (1973). Indeed, Congress specifically rejected the seepage theory that Plaintiffs-Appellants espouse in this case. *See* 118 Cong. Rec. 10,666 (1972) (Rep. Aspin, the sponsor of a rejected amendment to regulate pollution to groundwater, argued it was needed 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.” (emphasis added)). Congress thus intentionally declined to require NPDES permits for the addition of pollutants into groundwater that

eventually enter surface waters, and this Court should uphold this distinction.

Plaintiffs-Appellants' reliance on *Peconic Baykeeper, Inc. v. Suffolk County*, 600 F.3d 180 (2d Cir. 2010), in support of their "hydrological connection" theory is misplaced. *Peconic Baykeeper* simply held that the discharge of pesticides from trucks and helicopters into navigable waters is a direct discharge from a point source. *Id.* at 188; *see also No Spray Coal., Inc. v. City of New York*, 2005 U.S. Dist. LEXIS 11097, *25 (S.D.N.Y. 2005) (pesticide application "*directly* over or into [surface] water" would be a discharge from a point source (emphasis added)); *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1185 (9th Cir. 2002) (aircraft equipped with tanks spraying pesticide from mechanical sprayers "*directly* over covered waters" was a discharge from a point source (emphasis added)). Groundwater was not at issue in that case, and *Peconic Baykeeper* does not support Plaintiffs-Appellants' theory.

The district court cases Plaintiffs-Appellants cite to support their theory are also unavailing. *See* Brief of Plaintiffs-Appellants at 43. First, many of these cases rely on generalized appeals to the goals of the

CWA for their finding of CWA jurisdiction over the groundwater in question. *See, e.g., Wash. Wilderness Coal. v. Hecla Mining Co.*, 870 F. Supp. 983, 990 (E.D. Wash. 1994) (characterizing cases that adopt a hydrological connection theory as being driven by the “logic” of the goal of the CWA in adopting that theory). Such generalized appeals should be rejected because they are unsupported by the operative language and legislative history of the CWA.

Importantly, no Circuit Court has adopted such an imprecise theory of jurisdiction due to the alleged *effects* of groundwater on surface waters. This Court should not become the first to do so, particularly under the highly attenuated theory that Plaintiffs-Appellants advance here. They have failed to allege with any specificity how the groundwater under their basements is connected to any waters of the United States. Plaintiffs-Appellants do not point to a single case—at any level—that extends the “hydrological connection” theory to pollutant migration into diffuse groundwater with such an implausible connection to waters of the United States.

Plaintiffs-Appellants and potential Amici Curiae Waterkeeper Alliance *et al.* also rely on an EPA statement on an unrelated proposed

rule—in the description of a regulatory option that was never adopted—to support their “hydrologic connection” theory. Brief of Plaintiffs-Appellants at 43-44; Waterkeeper Brief at 11-14. However, the EPA statements they cite are contrary to the text, structure and legislative history of the CWA and are not the type of administrative agency statements that are accorded deference. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) (Since Congress has directly spoken to the “precise question at issue,” the Act’s text controls).

The EPA statements that the parties erroneously claim reflect a definitive legal interpretation were made in 2001, as part of a proposal to update unrelated CWA regulations regarding Concentrated Animal Feeding Operations (“CAFOs”). EPA proposed, among various regulatory options, to require groundwater monitoring and discharge controls unless the CAFO could show that the groundwater beneath manure storage areas or stockpiles did not have a direct hydrological connection to surface waters (“Option 3”). See *Waterkeeper Alliance, Inc. v. U.S. EPA*, 399 F.3d 486, 514 (2d Cir. 2005). Plaintiffs-Appellants cite EPA’s legal analysis in support of that option, which EPA decided not to

adopt. See 66 Fed. Reg. 2960, 3015-18 (Jan. 12, 2001) (legal analysis); 68 Fed Reg. 7176, 7216 (Feb. 12, 2003) (final rule). The legal analysis, therefore, does not underpin *any* final EPA regulation. See *Waterkeeper Alliance*, 399 F.3d at 515 (upholding EPA's decision not to adopt Option 3). As the legal analysis supporting Option 3 was not at issue in the proceeding, *Waterkeeper Alliance* does not speak to a hydrological connection theory generally, much less to any potential applicability to Plaintiffs-Appellants' basements, which are wholly distinct from the CAFOs at issue in that case.

Potential Amici Curiae *Waterkeeper Alliance et al.* claim that the same 2001 statement by EPA, and a subsequent response to comments in EPA's 2015 Clean Water Rule, are entitled to *Chevron* deference. *Waterkeeper* Brief at 16-17. This argument fails for two reasons. First, because the regulatory option in question was never adopted, the statement is not the product of notice-and-comment rulemaking and lacks the force of law that *Chevron* deference requires. *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). It is particularly inappropriate to apply *Chevron* deference to a statement on an un-

adopted proposed rule when that rule addresses such different circumstances from the ones at issue in this litigation.³

Second, the statement is contrary to the CWA’s plain language. The statute is unambiguous that the NPDES permit program applies only where there is a discharge of a pollutant from a point source to a navigable water. 33 U.S.C. §§ 1311(a), 1362(12). Under Plaintiffs-Appellants theory of liability, there can be no discharge “from a point source” since groundwater is neither a point source or navigable water. Since Congress has directly spoken to the “precise question at issue,” the Act’s text controls. *Chevron*, 467 at 837.

For these reasons, this Court should affirm the District Court decision and decline to adopt Plaintiffs-Appellants’ “hydrological connection” theory of liability.

B. Applying the Hydrological Connection Theory to Ordinary Operations of POTWs Could Impose Significant Costs on Amici and the Public

By shifting away from discrete outfalls to more nebulous “connections,” adopting the hydrological connection theory here could

³ For the same reason, a response to comments is not subject to *Chevron* deference, contrary to the argument of potential Amici Curiae Waterkeeper Alliance *et al.* See Waterkeeper Brief at 14.

have serious and costly implications for municipal utilities and the permitting authorities that regulate them, in an end run around Congress' decision not to regulate groundwater under the CWA, even groundwater with a hydrological connection to surface waters. The NPDES program is designed to be an "end-of-pipe" program where pollutants can be effectively monitored and reported to permitting authorities; Plaintiffs-Appellants are effectively asking this Court to rewrite the CWA.

Wastewater and stormwater utilities operate and maintain massive infrastructure networks that are already subject to NPDES permitting with detailed end-of-pipe requirements for their known discharge points. The unpredictable and sporadic nature of basement backflows would be unworkable additions to the discharge permits, since it would be impossible to determine in advance if any particular backup had the requisite hydrological connection to a surface water to establish CWA liability under this theory.

Moreover, even in the best run system, some backflows and leaks will occur, and subjecting these incidents to potential CWA liability could force utilities to divert limited resources from other necessary

programs protecting public health and the environment to address events with only speculative or attenuated impacts on jurisdictional waters. Any costs associated with liability for—or prevention of—backflows and leaks would ultimately be borne by ratepayers.

Finally, because backflows can also be caused by blockages or defects in the building's own plumbing, this theory could subject private building owners to potential CWA liability and permitting requirements whenever their own systems cause basement flooding and attendant pollutant "seepage." Indeed, there could be any number of pollutants present in basements besides sewage backflow that could filter into the groundwater beneath the building; adopting the Plaintiffs-Appellants' hydrological connection theory could make building owners subject to CWA enforcement for any pollutants that seep through cracks in their basements.

POINT IV

NO FACTUAL INQUIRY IS NECESSARY THEREFORE DISMISSAL OF THE COMPLAINT WAS APPROPRIATE

The District Court correctly determined that a factual analysis was not necessary before dismissing the Amended Complaint. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (to survive a motion to

dismiss a complaint must allege sufficient fact to “allow[] the court to draw the reasonable inference that the defendant is liable”).

Plaintiffs-Appellants cite to several inapposite cases to argue that CWA jurisdictional questions should not be resolved on motions to dismiss. Brief of Plaintiffs-Appellants at 47-51. Those cases involve allegations that could, as a matter of law, form the basis of CWA jurisdiction and therefore fact finding could have been appropriate. *See, e.g., Cordiano*, 575 F.3d at 218-19 (focus on whether the site contained jurisdictional wetlands). Here, by contrast, there is no plausible basis for CWA jurisdiction that would warrant a factual inquiry. As explained above, the groundwater could not itself be a “discernible, confined and discrete conveyance,” groundwater is not a water of the United States as a matter of law, and Plaintiffs-Appellants’ hydrologic connection theory of liability is contrary to the Act and not a basis to find a violation of the CWA. The District Court did not need any fact-finding to dismiss the Amended Complaint.

CONCLUSION

This Court should affirm the District Court's decision and decline to extend the CWA's jurisdiction to pollutants that may enter groundwater beneath Plaintiffs-Appellants' basements.

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November 13, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word 2010, and according to that software, it contains 6,967 words, not including the table of contents, table of authorities, this certificate, and the cover.

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