No. _____

In the
Supreme Court of the United States

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

Petitioners,

v.

UPSTATE FOREVER and SAVANNAH RIVERKEEPER,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
C. HARKER RHODES IV
LAUREN N. BEEBE
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Petitioners

August 28, 2018

QUESTIONS PRESENTED

The Clean Water Act requires a permit for the "discharge of pollutants" into navigable waters, defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §1362(12). The Act leaves the States with primary responsibility to regulate all other forms of pollution, including the discharge of pollutants into soil and groundwater. Petitioners own a pipeline that ruptured and spilled gasoline into the soil and groundwater four years ago. Within days of discovering the leak, petitioners fully repaired the pipeline, and have worked with state authorities ever since to remediate the spill. Some gasoline that spilled into the soil and groundwater has been conveyed by groundwater into nearby navigable waters. In the context of a citizen suit filed two years after the pipe was repaired, the Fourth Circuit concluded that this seepage of gasoline through soil and groundwater constitutes an "ongoing violation" of the Act's prohibition on unpermitted discharges of pollutants from a point source to navigable waters.

The questions presented are:

1. Whether the Clean Water Act's permitting requirement is confined to discharges from a point source to navigable waters, or whether it also applies to discharges into soil or groundwater whenever there is a "direct hydrological connection" between the groundwater and nearby navigable waters.

2. Whether an "ongoing violation" of the Clean Water Act exists for purposes of the Act's citizen-suit provision when a point source has permanently ceased discharging pollutants, but some of the pollutants are still reaching navigable water through groundwater.

PARTIES TO THE PROCEEDING

Kinder Morgan Energy Partners, L.P. and Plantation Pipe Line Company, Inc. are petitioners here and were defendants-appellees below. Upstate Forever and Savannah Riverkeeper are respondents here and were plaintiffs-appellants below.

CORPORATE DISCLOSURE STATEMENT

Kinder Morgan Energy Partners, L.P. is 100% owned by Kinder Morgan G.P., Inc., which is 100% owned by Kinder Morgan, Inc. Plantation Pipe Line Company, Inc. is 51% owned by Kinder Morgan Energy Partners, L.P. and 49% owned by ExxonMobil Corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

PETITION FOR WRIT OF CERTIORARI

The Clean Water Act ("CWA"), 33 U.S.C. §1251 *et seq*., does not impose federal supervision over any and all sources of pollution that conceivably could affect any and all water quality. Instead, Congress created a federal permitting system targeted at a particular type of pollution to a specific type of water: the "discharge of pollutants," meaning "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §1362(12). For nonpoint-source pollution, including the pollution of soil and groundwater, the CWA respects our federal system by leaving the States with primary responsibility to develop appropriate regulatory programs tailored to local conditions.

For years, lower courts were in agreement that the CWA's permitting scheme does not apply to the discharge of pollutants into groundwater, as Congress drew a careful line between navigable waters and groundwater throughout the CWA, and made plain its intention to regulate only the former. Likewise, for years, lower courts agreed that groundwater pollution is not "point source" pollution, as the CWA defines a "point source" as a "discernible, confined and discrete conveyance," 33 U.S.C. §1362(14), which groundwater manifestly is not. But over the past year, two courts of appeals, including the Fourth Circuit in the decision below, have reached the contrary conclusion. According to the Fourth Circuit, the CWA applies not only to the discharge of pollutants into navigable waters, but also to the discharge of pollutants into soil and groundwater, as long as some of those pollutants

migrate from that groundwater into navigable waters through a "direct hydrological connection." App.22-24.

That conclusion squarely conflicts with decisions from the Fifth and Seventh Circuits and numerous district courts—not to mention the CWA's text, structure, and history. As that history reveals, the omission of "groundwater" from the CWA's jurisdictional reach was no accident. Congress expressly considered—and expressly rejected—numerous requests to expand the CWA to create federal authority to regulate groundwater precisely because of its "hydrological connection" to navigable waters. But despite recognizing that jurisdiction over groundwater would be useful to EPA's authority to preserve the water quality of navigable waters, Congress expressly withheld authority over groundwater on federalism grounds. As the Fifth and Seventh Circuits correctly concluded, the statute simply cannot be interpreted to create precisely the result Congress so plainly intended to prevent. The Fourth and Ninth Circuits' contrary conclusions not only have dramatically expanded the CWA's permitting requirement, but have spawned massive confusion over jurisdictional lines and permitting requirements that must be clear to function properly.

The decision below compounds those problems by embracing a boundless conception of what constitutes an "ongoing violation" of the CWA. This Court already answered that question in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987), which squarely rejected the notion that a discharge that is not ongoing, but wholly in the past can constitute an "ongoing violation" of the CWA. Yet

according to the decision below, a pipeline leak that concededly was repaired years ago constitutes an "ongoing violation" of the CWA's permitting requirement so long as any of the gasoline that leaked into the soil and groundwater continues to find its way to navigable waters. That conclusion reflects the Fourth Circuit's mistaken focus on whether pollution reaches navigable waters, rather than on the discharge from the point source. The decision squarely conflicts with *Gwaltney* and decisions from the Fifth Circuit and other courts that are faithful to *Gwaltney* and that reject the argument that the lingering effects of a wholly past discharge constitute an ongoing violation of the CWA.

The decision below not only solidifies two circuit splits, but contributes to the ever-growing uncertainty over the scope of the CWA. As several Justices have recognized, the CWA is a "notoriously unclear" statute whose "reach and systemic consequences … remain a cause for concern." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1816 (2016) (Kennedy, J., joined by Thomas and Alito, JJ., concurring). The decision below makes that statute substantially less clear and even more expansive in its potential reach. Individuals and businesses that discharge pollutants (even inadvertently) into surrounding soil, which could then travel through a variety of diffuse, hydrologically connected systems to navigable water, cannot know under the current state of the law whether they must pursue costly permits. Yet if they refrain from doing so, they risk expensive litigation and retroactive liability—not to mention attorney fees—in citizen suits over groundwater and past violations that Congress never intended to authorize.

This Court should grant certiorari to resolve the divisions of authority that the decision below exacerbates, and to restore the CWA to the bounds that Congress intended.

OPINIONS BELOW

The Fourth Circuit's opinion is reported at 887 F.3d 637 and reproduced at App.1-51. The district court's opinion is reported at 252 F.Supp.3d 488 and reproduced at App.54-73.

JURISDICTION

The Fourth Circuit issued its 2-1 panel decision on April 12, 2018, and denied rehearing on May 30, 2018 by a divided 7-5 vote. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced at App.74-88.

STATEMENT OF THE CASE

A. The Clean Water Act

Congress enacted the Clean Water Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). The statute creates a regulatory scheme that respects our federal structure by dividing the authority to regulate water pollution between the federal government and the States. As Congress intended, that scheme "protect[s] the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution, [and] to plan the development and use … of land and water resources," *id.* §1251(b),

while also providing for direct federal regulation in certain limited circumstances.

1. The CWA prohibits "the discharge of any pollutant by any person," except as otherwise permitted by the Act. 33 U.S.C. §1311. That provision is cabined by the statutory term "discharge of any pollutant," defined primarily as "any addition of any pollutant to navigable waters from any point source." *Id.* §1362(12). As relevant here, that definition establishes two important limitations on the scope of federal regulation under the CWA.

First, the federal prohibition on the "discharge of any pollutant" extends only to pollutants discharged "to navigable waters," which the CWA defines as "the waters of the United States." *Id.* §1362(7). While the federal government has sometimes given that phrase an expansive reading, this Court has repeatedly cabined federal jurisdiction to maintain the balance struck by Congress in enacting the CWA. *See, e.g.*, *Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs* ("*SWANCC*"), 531 U.S. 159 (2001). Moreover, the statutory focus on navigable waters makes clear that the CWA leaves the States with primary authority over discharges of pollution into the soil and groundwater.

That decision was no accident. In enacting the CWA, Congress specifically rejected proposals to extend federal authority to reach discharges into groundwater. For instance, then-EPA-Administrator William Ruckelshaus specifically requested statutory authority to regulate discharges into groundwater in order to preserve water quality by exercising "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 Comm. on Pub. Works*, 92d Cong. 230 (1971) [hereinafter *Hearings*] (emphasis added); *see also* 118 Cong. Rec. 10,666 (1972) (proposal to extend NPDES permitting to groundwater because "ground water gets into navigable waters"). While recognizing the connections between groundwater and surface-water pollution, Congress repeatedly rejected those requests, finding regulation of groundwater pollution a matter better left to the States. S. Rep. No. 92-414, at 73 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3739; *see also, e.g.*, 118 Cong. Rec. 10,666, 10,669 (rejecting by a 34-86 vote an amendment to "bring[] ground water into the subject of the [CWA]").

Second, the federal prohibition extends only to discharges from a "point source," which the CWA defines as "any discernible, confined and discrete conveyance … from which pollutants are or may be discharged," 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." 33 U.S.C. §1362(14). That limitation codifies another federalism-preserving dichotomy: Point-source discharges from discrete, identifiable conveyances to navigable waters are covered by §1311 and regulated through the federal permitting system in §1342 (described below). By contrast, nonpoint-source discharges such as surface runoff and diffuse groundwater pollution are left to regulation by state management programs, which are established by the

States subject to federal approval. *See* 33 U.S.C. §1329(b). All 50 States have adopted such programs. *See* EPA, State Contacts for NPS Pollution Programs, www.epa.gov/nps/state-contacts-nps-programs (last visited Aug. 28, 2018).

The CWA also establishes a federal permitting program, known as the National Pollutant Discharge Elimination System ("NPDES"), to allow regulated discharges that otherwise would be prohibited under §1311. 33 U.S.C. §1342. Like §1311, the NPDES permitting requirements apply only to the "discharge of any pollutant" as the statute defines that phrase—that is, discharges from point sources to navigable waters. *See* §1342(a). Conversely, discharges from nonpoint sources and discharges into features other than navigable waters do not require an NPDES permit. *Id.* NPDES permits can be issued either directly by EPA, §1342(a), or by the States through EPA-approved state permitting programs, §1342(b).

"The costs of obtaining [an NPDES] permit are significant." *Hawkes*, 136 S. Ct. at 1812. For a "general" permit, used for activities that "cause only minimal individual and cumulative environmental impacts," 33 C.F.R. §323.2(h), applications have required an average of 313 days and $28,915 to complete. *Hawkes*, 136 S. Ct. at 1812. For a specialized "individual" permit, the average application time increases to 788 days, and the average cost of completing the application (not including the cost of any mitigation or design changes) jumps nearly tenfold to $271,596. *Id.*

2. Authority to enforce the CWA rests initially with EPA, which can seek administrative, civil, or

criminal sanctions for past or ongoing discharges covered by the statute that are made without or in violation of an NPDES permit. 33 U.S.C. §1319. State authorities likewise can seek administrative, civil, or criminal penalties for any past or present violation of a state-issued NPDES permit. *Id.* §§1319, 1342(b)(7). The available remedies in a civil enforcement action include injunctive relief and penalties of over $50,000 per day for each violation; criminal penalties range from a minimum fine of $2500 for a negligent violation, up to a fine of $500,000 and 30 years in prison (or $2 million for an organization) for a knowing repeat violation that endangers others. *Id.* §1319; 40 C.F.R. §19.4 tbl.2.

The Act provides for limited private enforcement through its citizen-suit provision. 33 U.S.C. §1365. When neither EPA nor a State "has commenced and is diligently prosecuting a civil or criminal action" to remedy an ongoing CWA violation, the statute authorizes "any citizen" to bring a civil action against any person who is alleged "to be in violation" of the Act (including any permits or orders issued under the Act). *Id.* §1365(a). As this Court held in *Gwaltney*, that "to be in violation" language authorizes private citizens to sue only when they allege an ongoing "continuous or intermittent violation" of the Act—that is, "a reasonable likelihood that a past polluter will continue to pollute in the future." 484 U.S. at 57. By contrast, citizen suits are not available to address "wholly past violations," as the very fact that the point-source discharges have ceased may explain the lack of a government suit and allowing private suits "could undermine the supplementary role envisioned for the citizen suit" and "change the nature of the citizens'

role from interstitial to potentially intrusive." *Id.* at 60-61.

For remedies, the CWA permits private citizens to seek injunctive relief, as well as civil penalties payable to the U.S. Treasury. 33 U.S.C. §1365(a); *see Gwaltney*, 484 U.S. at 53. It also permits recovery of attorney fees, expert witness fees, and other litigation costs for successful suits. *Id.* §1365(d).

B. Proceedings Below

1. Petitioners Kinder Morgan Energy Partners, L.P. and Plantation Pipe Line Company, Inc. ("Kinder Morgan") own and operate the Plantation Pipe Line, a 3,100-mile underground pipeline network that runs from Louisiana to Washington, DC. App.55. In early December 2014, Kinder Morgan learned that a portion of its pipeline located in Anderson County, South Carolina had developed a crack 6 to 8 feet underground and spilled some 370,000 gallons of petroleum products comprised of gasoline and diesel into the surrounding soil and groundwater. App.6.

As soon as it discovered the leak, Kinder Morgan took immediate action. Within a few days, Kinder Morgan had fully repaired the pipeline, ending the discharge of pollutants into the soil and groundwater. App.27-28. Kinder Morgan took immediate steps to investigate the extent of the spill and begin remediation, working under the guidance of the South Carolina Department of Health and Environmental Control. App.27-28. To this day, Kinder Morgan continues to work with state authorities to remove any remaining leaked gasoline from the site and carry out further remediation. App.28. For instance, Kinder Morgan has worked with the South Carolina

authorities to develop and implement multiple Comprehensive Site Assessments and Corrective Action Plans; installed 98 temporary monitoring wells, 20 product recovery sumps, and 15 recovery wells; started up an extensive biosparging system; removed more than 2,800 tons of contaminated soil; and recovered more than 222,980 gallons of spilled petroleum products.

2. In December 2016, approximately *two years after* the spill was discovered and the leak fully repaired, respondents Upstate Forever and Savannah Riverkeeper (two environmental advocacy groups) sued Kinder Morgan under the CWA citizen-suit provision. Although respondents recognized that the pipeline had spilled gasoline into the soil and groundwater—not navigable water—they alleged that the spill violated the CWA because the groundwater has a "direct hydrological connection" to nearby navigable water. App.6-7, 9. Respondents also recognized that the pipeline was no longer discharging pollutants into the surrounding soil, but claimed there was a continuing violation because pollutants continued to seep through hundreds of feet of soil and groundwater to nearby tributaries and wetlands. App.6-7. Dissatisfied with the ongoing state-supervised remediation efforts, respondents sought damages, declaratory relief, and injunctive relief requiring Kinder Morgan to take additional measures to abate the remaining effects of the two-year-old spill. App.9.

3. The district court dismissed the complaint on two grounds. First, it rejected respondents' view that the CWA covers a discharge of pollutants into

groundwater that has a "direct hydrological connection" to navigable waters. App.67-72. As the court noted, other district courts "are split on this issue." App.68. However, at the time the district court ruled, "the two circuit courts to address this issue have concluded that navigable waters do[] not include groundwater that is hydrologically connected to surface waters." App.68 (citing *Rice v. Harken Expl. Co.*, 250 F.3d 264 (5th Cir. 2001), and *Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir. 1994)). Adopting that approach, the district court explained that "'navigable waters' and 'ground waters' are separate and distinct concepts in the CWA," and that extending the Act to cover groundwater that is "hydrologically connected" to navigable waters would erase that distinction. App.70.

The court also rejected respondents' view that they alleged an ongoing violation because pollution released from the pipeline before it was repaired in December 2014 allegedly "continues to make its way" to navigable waters. App.61. Because there was "no continuing discharge from the pipeline," and no allegation that the pipeline would discharge pollutants into navigable waters in the future, respondents could not show the continuing or intermittent CWA violation that a citizen suit requires. App.62-63. To the extent any "migration of pollutants through soil and groundwater" was continuing to occur, it was "nonpoint source pollution that is not within the purview of the CWA." App.62.[1]

[1] The district court likewise rejected respondents' arguments that the remaining pollution at the spill site, the "seeps, flows,

4. A divided panel of the Fourth Circuit reversed on both grounds. In an opinion by Judge Keenan, joined by Chief Judge Gregory, the majority held that the CWA covers not only discharges of pollutants into navigable waters (as its text states), but also discharges of pollutants into groundwater with a "direct hydrological connection" to navigable waters. App.23-24. According to the majority, the CWA "does not require a discharge directly to navigable waters," but instead covers discharges into groundwater that eventually pass into navigable waters—at least, as long as there is a "clear connection" between the discharge and the later effect on navigable waters. App.20-22. The majority acknowledged that this "assessment of the directness of a hydrological connection" is necessarily a fact-specific inquiry, depending on factors such as "time and distance" and "geology, flow, and slope." App.23-24. Applying its new standard, the majority concluded that respondents adequately alleged a "direct hydrological connection" between the groundwater around the spill site and navigable waters. App.24-26.

The majority also held that, even though it was undisputed that the pipeline was no longer emitting any pollutants, respondents had adequately alleged an ongoing violation. While the majority recognized that the CWA authorizes citizen suits only to redress "continuous or intermittent" violations, App.12, it held that requirement satisfied because the CWA "does not require that the point source continue to release a pollutant for a violation to be ongoing." App.15.

---

and fissures" in the surrounding soil, or the remediation efforts were point sources. App.63-66.

Although the Fifth Circuit had enforced such a requirement in *Hamker v. Diamond Shamrock Chem. Co.*, 756 F.2d 392 (5th Cir. 1985), the majority "decline[d] to adopt the Fifth Circuit's approach." App.18 n.9. Instead, the majority held that the CWA requires only an "ongoing addition [of pollution] to navigable waters," a requirement that it concluded was met here because the groundwater allegedly continued to carry pollution from the two-year-old spill into nearby streams. App.16-17.

Judge Floyd dissented. As he explained, the text, history, and structure of the CWA compel the conclusion that "not every addition of pollution amounts to a CWA violation—much less an ongoing CWA violation." App.27. Instead, "for there to be an ongoing CWA violation, there must be an ongoing addition of pollutants from a point source into navigable waters." App.27. Because "the only point source at issue—Kinder Morgan's pipeline—has been repaired and is not currently adding any pollutants into navigable waters," respondents had not alleged any current, ongoing discharge that could authorize their citizen suit. App.27; *see also* App.41-42. The "ongoing migration" of groundwater contamination, Judge Floyd explained, is "by definition, nonpoint source pollution" and thus "outside of the CWA's reach." App.44.

A closely divided Fourth Circuit denied rehearing en banc by a 7-5 vote. App.52-53.

REASONS FOR GRANTING THE PETITION

The decision below contributes to growing division among the lower courts on two questions that are critical to the proper scope of the CWA. First, the

Fourth Circuit has joined the Ninth Circuit in holding that the CWA applies not only to discharges into navigable waters, but also discharges into soil and groundwater, so long as there is a "direct hydrological connection" (or, in the Ninth Circuit's equally atextual formulation, a "fairly traceable" connection) between the groundwater and some navigable water. That conclusion conflicts with decisions of the Fifth and Seventh Circuits, as well as decisions from numerous district courts. Worse still, it contradicts the text, structure, and history of the CWA, and expands the statute's permitting program to cover things that Congress expressly reserved to the States.

The Fourth Circuit then compounded the problem by concluding that discharges into soil and groundwater not only fall within the CWA, but also can constitute "ongoing violations" long after the actual point-source discharges have ceased. In the Fourth Circuit's view, so long as pollutants continue to make their way into navigable waters, the CWA continues to be violated, even if there is no ongoing discharge from the point source at all. That nonsensical result conflicts with decisions from this Court, the Fifth Circuit, and the many district courts that have recognized that a long-ceased discharge cannot plausibly be deemed an "ongoing" violation. The Fourth Circuit's contrary conclusion is just another symptom of the inevitable problems with its mistaken conception that the CWA is concerned only with whether pollutants are finding their way into navigable waters, not whether they get there from an ongoing discharge from a point source. In reality, Congress carefully confined the CWA's permitting regime to apply only to the *discharge* of pollutants

from a point source *to* navigable waters. The decision below radically expands the statute in ways that Congress plainly did not intend.

The questions presented have enormous practical impact. As numerous members of this Court have observed, the CWA is notoriously vague, its permitting requirements are expensive, and its potential reach has the capacity to obliterate the cooperative federalism Congress envisioned. By generating massive uncertainty about when, and for what, a permit is required, the decision below will force both regulators and the regulated community to expend considerable resources seeking and trying to figure out how to craft permits for circumstances that Congress never intended to cover. And the ultimate result will be an ever-increasing shift of regulatory power away from the States (like South Carolina, which has been actively addressing the long-fixed leak for years) and into the hands of federal regulators and late-on-the-scene citizen-suit filers, which is precisely the result Congress unmistakably sought to avoid both generally and with respect to groundwater in particular. The Court should grant certiorari and restore the balance of power that Congress so carefully crafted the CWA to achieve.

I. This Court Should Resolve The Circuit Split Over When, If Ever, The Clean Water Act Applies To A Discharge Into Soil Or Groundwater.

A. Lower Courts Are at Odds over Whether the Clean Water Act Applies to Discharges into Soil or Groundwater.

The decision below joins a deepening conflict in the federal courts over whether the CWA and its NPDES permitting program apply to the discharge of pollutants through soil and groundwater if the pollutants ultimately reach navigable waters. As the district court recognized, when this case was filed, the circuit court decisions addressing that question had all adhered to the statutory scheme and held that the discharge of pollutants into soil and groundwater is outside the CWA. *See* App.68. Since then, however, both the Fourth Circuit (in the decision below) and the Ninth Circuit have broken from that consensus, holding that a permit must be obtained for discharges into soil or groundwater if the groundwater has a "direct hydrological connection" to navigable waters (per the Fourth Circuit), or the connection between the groundwater and navigable waters is "fairly traceable" (per the Ninth Circuit). District courts likewise have taken both sides of the issue, leaving the lower courts in square conflict.

Until recently, no circuit had ever construed the CWA to apply to discharges into soil or groundwater, whether or not some of the discharge ultimately reached navigable water. In *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, for instance, the Seventh Circuit considered whether a permit was

required for a "retention pond" built to catch runoff from a warehouse parking lot. 24 F.3d 962, 963 (7th Cir. 1994). Although the court recognized that water carrying pollutants could seep from the pond into nearby groundwater, and thence into navigable waters, it nonetheless held the retention pond was not covered by the CWA. As the court explained, the CWA does not "assert[] authority over ground waters, just because these may be hydrologically connected with surface waters." *Id.* at 965. That exclusion "is not an oversight"; on the contrary, legislative proposals to extend the CWA to reach groundwater "have been defeated." *Id.*

The Fifth Circuit followed the same approach in *Rice v. Harken Exploration*, in which plaintiffs alleged that discharges from oil and gas wells had "seeped through the ground into groundwater which has, in turn, contaminated several bodies of surface water." 250 F.3d 264, 265, 270-71 (5th Cir. 2001).[2] The Fifth Circuit rejected that claim, concluding that it would be an "unwarranted expansion" of the statute to apply it to "discharges onto land, with seepage into groundwater, that have only an indirect, remote, and attenuated connection with an identifiable body of 'navigable waters.'" *Id.* at 271. Extending the federal scheme to such "remote, gradual, natural seepage" would ignore Congress' clear decision "to leave the regulation of groundwater to the States." *Id.* at 272; *see also Exxon Corp. v. Train*, 554 F.2d 1310, 1324 (5th Cir. 1977) ("Congress meant to stop short of

[2] Although *Rice* involved a claim under the Oil Production Act of 1990 rather than the CWA, the Fifth Circuit made clear that both statutes have the same scope. 250 F.3d at 267-68.

establishing federal controls over groundwater pollution").

Other federal courts of appeals have expressed support for the same conclusion. *See, e.g.*, *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1141 & n.4 (10th Cir. 2005) (expressing doubt that CWA would apply to "migration of pollutants from prior discharges" through soil or groundwater); *United States v. Johnson*, 437 F.3d 157, 161 n.4 (1st Cir. 2006) (noting that "[t]he CWA does not cover any type of ground water"), *vacated on other grounds*, 467 F.3d 56 (1st Cir. 2006). Those decisions respect the principle that the CWA covers only point-source discharges into navigable waters—not all discharges that eventually reach navigable waters. *See, e.g.*, *Simsbury-Avon Pres. Soc'y v. Metacon Gun Club, Inc.*, 575 F.3d 199, 223-24 (2d Cir. 2009) (firing range that discharged pollutants to airborne dust and surface runoff that reached navigable waters not covered by CWA); *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45 (5th Cir. 1980) (rejecting view that CWA applies "regardless of how the pollutant found its way from th[e] original source to the waterway").

Numerous district courts likewise have held that a discharge into soil or groundwater is not covered by the CWA, even if that groundwater is "hydrologically connected" to navigable waters (as almost all groundwater is). *See, e.g.*, *Ky. Waterways All. v. Ky. Utils. Co.*, 303 F. Supp. 3d 530, 543-45 (E.D. Ky. 2017), *appeal pending*, No. 18-5115 (6th Cir. argued Aug. 2, 2018); *26 Crown Assocs., LLC v. Greater New Haven Reg'l Water Pollution Control Auth.*, No. 3:15-CV-1439 (JAM), 2017 WL 2960506, at *1 (D. Conn. July 11,

2017), *appeal pending*, No. 17-2426 (2d Cir. argued Apr. 18, 2018); *Tri-Realty Co. v. Ursinus Coll.*, 124 F. Supp. 3d 418, 459 (E.D. Pa. 2015); *Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc.*, 25 F. Supp. 3d 798, 810 (E.D.N.C. 2014).

The Fourth and Ninth Circuits have now disagreed with those courts (and with each other), adopting two different tests under which a discharge into soil or groundwater may be covered by the CWA. In the Fourth Circuit, under the decision below, a discharge into soil or groundwater is subject to the CWA and its permitting program so long as it passes through groundwater that has a "direct hydrological connection" to navigable waters. App.26. And the Ninth Circuit adopted a similar (but not identical) approach, breaking from its sister circuits by holding that the CWA applies to a discharge from a point source into groundwater that then finds its way to navigable waters so long as the discharge is "fairly traceable from the point source to a navigable water" and pollutants eventually reach the navigable water at "more than *de minimis*" levels. *Hawai'i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737, 749 (9th Cir. 2018). Needless to say, neither formulation has any grounding in the statutory text.[3]

Deepening the conflict, several district courts have applied varying tests under which discharges into soil or groundwater may be covered, with some

[3] Although the Fourth Circuit saw no difference between its "direct hydrological connection" standard and the Ninth Circuit's "fairly traceable" rule, *see* App.24 n.12, the Ninth Circuit disagreed, as it explicitly rejected the direct-hydrological-connection test. *Hawai'i Wildlife Fund*, 886 F.3d at 749 n.3.

adopting a "direct hydrological connection" standard, others a "traceability" standard, and still others some different formulation. *See, e.g.*, *Flint Riverkeeper, Inc. v. S. Mills, Inc.*, 276 F. Supp. 3d 1359, 1366-68 (M.D. Ga. 2017) (denying motion to dismiss complaint alleging discharge into groundwater with a "direct hydrological connection" to navigable water); *Tenn. Clean Water Network v. Tenn. Valley Auth.* ("*TVA*"), 273 F. Supp. 3d 775 (M.D. Tenn. 2017) (plaintiff must be able to "trace pollutants from their source to [navigable] waters"), *appeal pending*, No. 17-6155 (6th Cir. argued Aug. 2, 2018); *Hernandez v. Esso Standard Oil Co. (P.R.)*, 599 F. Supp. 2d 175, 181 (D.P.R. 2009) (groundwater must be "hydrologically connected" to navigable water). In short, the federal courts are in deep disagreement over whether (and if so how) the CWA applies to discharges into soil or groundwater when pollutants eventually make their way to navigable waters.

B. The Decision Below Upends Congress' Statutory Scheme and Is Completely Unworkable.

The decision below not only adds to a growing conflict in the lower courts, but is contrary to the text, structure, and legislative history of the CWA and this Court's precedent. The CWA reflects a deliberate choice by Congress to limit direct federal regulation under the statute to point-source discharges into navigable waters, and to leave the regulation of groundwater to the States. The decision below eviscerates that deliberate and fundamental distinction, and indeed embraces the very result Congress explicitly refused to authorize.

1. The text, structure, and history of the CWA confirm that it does not apply to discharges to soil or groundwater.

The statutory analysis begins, as always, with the text. The CWA limits the scope of its permitting requirement by expressly defining the "discharge of a pollutant" to mean only the "addition of any pollutant *to navigable waters* from any point source." 33 U.S.C. §1362(12) (emphasis added). Under the plain language of that definition, a discharge into soil or groundwater (whatever it is hydrologically connected to) falls outside the scope of the CWA because neither soil nor groundwater constitutes "navigable waters." The CWA defines "navigable waters" as "the waters of the United States," a term whose "only plausible interpretation … includes only those relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams, oceans, rivers, and lakes." *Rapanos*, 547 U.S. at 739 (plurality opinion) (brackets and ellipsis omitted).

While "waters of the United States" may encompass some features that would not be conventionally described as "navigable"—such as permanent wetlands abutting on rivers or lakes, *see id.* at 734-35—it most certainly does not encompass soil. Nor does it include water percolating through the soil deep underground. On the contrary, the NPDES permitting program regulates only discharges into "navigable waters" and makes no mention whatsoever of discharges into groundwater. 33 U.S.C. §1342; *see also* 40 C.F.R. §122.2 (for purposes of the CWA,

"waters of the United States" excludes "groundwater"). That exclusion is telling, as several provisions of the statute expressly distinguish between "ground waters" and "navigable waters." *See, e.g.,* 33 U.S.C. §1252(a) ("navigable waters and ground waters"); §1254(a)(5) (same).

The omission of groundwater from the definition of "discharge" is no oversight. The distinction between groundwater and navigable waters is key to the structure of the CWA, and to the balance Congress struck between federal and state authority. As the statute itself says, the "policy of the Congress" in enacting the CWA was "to recognize, preserve, and protect the primary responsibilities and rights *of States* to prevent, reduce, and eliminate pollution, [and] to plan the development and use … of land and water resources." 33 U.S.C. §1251(b) (emphasis added). To that end, Congress considered *and rejected* proposals to bring the seepage of pollutants through groundwater within the scope of the CWA.

For instance, then-EPA-Administrator Ruckelshaus specifically asked Congress to revise the proposed statute to grant EPA "control over all the sources of pollution, be they discharged directly into any stream *or through the ground water table*." *Hearings*, *supra*, at 230 (emphasis added). And after the Committee declined to "adopt th[e] recommendation" of several members to "provide[] authority to establish Federally approved standards for groundwaters which permeate rock[,] soil, and other subsurface formations," S. Rep. No. 92-414, at 73, a House member proposed an amendment "to bring[] "ground water into the subject of the bill"

because "ground water gets into navigable waters." 118 Cong. Rec. 10,666 (1972). The House rejected the proposal overwhelmingly, by a 34-86 vote. 118 Cong. Rec. 10,669.

The proposal was rejected not because anyone denied the connection between groundwater and navigable waters or that jurisdiction over groundwater would be useful in regulating navigable waters, but to preserve federalism. Congress "was aware that there was a connection between ground and surface waters," yet unequivocally "[left] the regulation of groundwater to the States." *Rice*, 250 F.3d at 271-72. Particularly given that history, the CWA cannot be read to achieve precisely the result Congress worked so carefully to avoid based largely on arguments Congress considered and rejected. Interpreting the statute to reach discharges into soil and groundwater would bring "virtually all planning of the development and use of land and water resources by the States under federal control," and "result in a significant impingement of the States' traditional and primary power over land and water use." *Rapanos*, 547 U.S. at 737-38 (plurality opinion) (quoting *SWANCC*, 531 U.S. at 174) (brackets and ellipsis omitted). Congress manifestly did not intend to effect such an "unprecedented intrusion into traditional state authority." *Id*. at 738.

Reading the CWA to cover the seepage of pollutants through soil and groundwater also would disrupt the statute's fundamental and federalism-preserving distinction between point- and nonpoint-source pollution. In addition to confining the CWA's permitting scheme to discharges into navigable

waters, Congress carefully confined the scheme to discharges "from any point source," defined as a "discernible, confined and discrete conveyance" like a pipe or tunnel. 33 U.S.C. §1362(12), (14). Like the distinction between groundwater and navigable water, the distinction between point and nonpoint sources is pervasive throughout the CWA. The statute expressly and repeatedly distinguishes between point-source pollution, which it regulates, and nonpoint-source pollution, which it leaves to the States and other statutes. For point sources, the CWA establishes the NPDES permitting program, *see* 33 U.S.C. §1342; for nonpoint sources, the CWA gives the States guidance on how to monitor such pollution, but ultimately leaves the States free to undertake that monitoring and remediation, *id.* §1329; *see id.* §1251(a)(7) (urging States to adopt "programs for the control of nonpoint sources of pollution").

As this Court has made clear, the defining feature of a point source is that it "transport[s]" or "convey[s] the pollutant to navigable waters." *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004). The diffuse movement of pollutants through groundwater plainly does not fit that bill. To the extent discharges into soil or groundwater find their way to navigable waters, the only thing that "conveys" them is the groundwater itself. But for the fact that groundwater moves, the discharge would stay put. But diffuse groundwater is hardly a "discernible, confined and discrete conveyance," which is why no court has embraced the position that groundwater itself is a point source. To the contrary, numerous courts have recognized that "[g]roundwater seepage" is "nonpoint source pollution, which is not

subject to NPDES permitting." *El Paso Gold Mines*, 421 F.3d at 1140 n.4; *see also, e.g.*, App.62 ("The migration of pollutants through soil and groundwater is nonpoint source pollution that is not within the purview of the CWA.").

2. The decision below misreads this Court's precedent and seeks to solve a problem that does not exist.

Ignoring these critical distinctions, the decision below reached a conclusion that cannot be squared with the text, structure, or clear intent of the statute. The majority below concluded that a discharge that passes from a point source into groundwater, and then passes on through a "direct hydrological connection" into navigable waters, is covered by the CWA. App.26. That is the equivalent of saying zero plus zero equals one, and it makes no more sense as a legal proposition than a mathematical one. The initial discharge from the point source into groundwater is not covered by the CWA because it is not a discharge "to navigable waters." 33 U.S.C. §1362(12). And the subsequent migration of contaminated groundwater into navigable waters is not covered either because it is not a discharge "from any point source." *Id.* It defies reason to conclude that Congress carefully cabined the CWA to disclaim federal jurisdiction over the first or second step in this process, but imposed federal regulation whenever the two steps happen in sequence (as they almost always will).

Unsurprisingly, the decision below cannot be squared with the statutory text. The CWA prohibits discharges "to navigable waters," not to "any water with a direct hydrological connection to navigable

waters." *Id.* It is no accident that both the Fourth and Ninth Circuits had to introduce language into the statute.[4] Absent such limiting language, EPA's authority would truly be boundless. But Congress omitted that language for a reason. The statute properly read simply does not extend to groundwater or give EPA every tool that might be useful in regulating navigable waters. It provides authority to regulate point-source discharges to navigable waters, which was enough for Congress. Indeed, anything more was deemed too much and too disruptive of the States. By expanding the statute to embrace the very proposal Congress rejected in passing the CWA, the decision below upends the federal-state balance Congress set and effects an "unprecedented intrusion into traditional state authority." *Rapanos*, 547 U.S. at 738 (plurality opinion).

Contrary to the Fourth Circuit's contentions, *Rapanos* does not support that result. In *Rapanos*, this Court considered whether the "waters of the United States" governed by the CWA included certain wetlands. The Sixth Circuit found those wetlands covered because there were "hydrological connections between all three sites and corresponding adjacent tributaries of navigable waters." *Id.* at 730. This Court reversed, with a four-Justice plurality concluding that only wetlands with a "continuous surface connection" to navigable waters are covered by

---

[4] Even the Ninth Circuit recognized that a "direct hydrological connection" standard "reads two words into the CWA ('direct' and 'hydrological') that are not there." *Hawai'i Wildlife Fund*, 886 F.3d at 749 n.3. But the Ninth Circuit's "fairly traceable" standard suffers from the exact same flaw.

the CWA, *id.* at 757, and Justice Kennedy concluding that a "significant nexus" is required, *id.* at 759 (Kennedy, J., concurring in the judgment). The plurality opinion explained that its narrower interpretation was required by the statutory text, as well as the need to preserve the federal-state balance Congress intended. *Id.* at 731-39. The plurality also explained that there was "no reason to suppose" its interpretation would undermine enforcement of the CWA because lower courts had read the statute to apply "even if the pollutants discharged from a point source do not emit 'directly into' covered waters, but pass 'through conveyances' in between." *Id* at 743.

As the context makes clear, the plurality was making only the unremarkable point that a discharge is covered by the CWA not only when the point source discharges directly into navigable waters, but also when the discharge travels through a series of "conveyances"—*i.e.*, other point sources—into navigable waters. *Id.* A pipe that discharges to a culvert that discharges to a ditch that discharges to navigable water is still covered by the CWA, even though that pipe itself does not discharge into the stream. *See id.* (citing examples of discharges from point sources into point-source conveyances leading to navigable waters). That is manifestly not the same thing as saying that discharges into *soil or groundwater*—which are neither navigable waters nor discrete conveyances into navigable waters—are covered. On the contrary, the *holding* of *Rapanos*—which *reversed* the Sixth Circuit for holding that "hydrological connections" to nearby navigable waters were enough to subject wetlands to the CWA—forecloses the Fourth Circuit's near-identical "direct

hydrological connection" test. *Id.* at 730-31, 757; *id.* at 784 (Kennedy, J., concurring in the judgment) (rejecting "hydrologic connection" test).

The conclusion that discharges into soil and groundwater are outside the scope of the CWA certainly does not mean that polluters can evade responsibility for their actions "by ensuring that all discharges pass through soil and ground water before reaching navigable waters." App.25. Discharges into soil and groundwater are subject to abundant regulation. The CWA envisions that the States should take the lead role in regulating soil and groundwater pollution, instructing them to adopt programs (subject to federal approval) to "control[] pollution added from nonpoint sources to the navigable waters within the State," which all 50 States have done. 33 U.S.C. §1329(b)(1); *see supra* pp.6-7. State regulation is complemented by federal regulation as well: Both the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §6901 *et seq.*, and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §9601 *et seq.*, specifically address the control and remediation of groundwater pollution. *See* 42 U.S.C. §6903(3) ("disposal" under RCRA includes discharge "into any waters, including ground waters"); *id.* §9601(8) (discharge into the "environment" under CERCLA includes discharges into "ground water"). Faithfully interpreting the CWA thus will not create any loophole for creative polluters, as there is simply no regulatory gap in need of filling.

By contrast, applying the CWA to discharges into soil and groundwater will inject massive confusion

into an already-complex regulatory scheme. The decision below provides no reliable definition of what constitutes a "direct hydrological connection," making it impossible for regulated entities to know in advance if any given discharge will need an NPDES permit.

Moreover, it is not at all clear how the NPDES permitting scheme would work as applied to discharges into soil or groundwater. The objective of the permit is to set "effluent limitations" for how much of a given pollutant may be discharged into navigable waters. 33 U.S.C. §1311(b)(1)(A). That makes sense in the context of discharges *from* point sources *to* navigable waters, as effluent levels can easily be measured at the point of discharge. But how does the requirement apply when there *is* no point at which pollutants are discharged into navigable waters—or, as in this case, when there is not even an identifiable discharge to measure? The obvious practical problems with trying to impose the NPDES permitting program on groundwater pollution confirm that Congress never intended to fit that square peg into this round hole.

II. This Court Should Resolve The Circuit Split Over Whether The Lingering Effects Of A Long-Ago-Ceased Discharge Can Constitute An "Ongoing Violation" Of The CWA.

The Fourth Circuit compounded the problems with its "direct hydrological connection" test by embracing a boundless "ongoing violation" rule. According to the Fourth Circuit, a long-ceased discharge into soil or groundwater constitutes an "ongoing violation" of the CWA's permitting requirement so long as pollutants are continuing to find their way into navigable waters. That conclusion

is flatly at odds with this Court's decision in *Gwaltney*, dramatically expands the CWA's citizen-suit provision far beyond what Congress intended, and ultimately is just another illustration of the inevitable problems with the Fourth Circuit's mistaken focus on where pollution ends up, rather than where and when it is discharged.

This Court confronted the question of what constitutes an "ongoing violation" of the CWA in *Gwaltney*, a citizen suit by two environmental advocacy groups against a meatpacking plant that had repeatedly violated the terms of its NPDES permit in the past. 484 U.S. at 53-54. There too, the Fourth Circuit held the suit could proceed, reading the CWA to authorize a citizen suit even when the unlawful discharge "occurred only prior to the filing of [the] lawsuit." *Id.* at 56.

This Court reversed. By authorizing citizen suits only when the defendant is alleged "to be in violation" of the Act, the Court held, Congress intentionally restricted private enforcement to situations involving a "continuous or intermittent violation—that is, a reasonable likelihood that a past polluter will continue to pollute in the future." *Id.* at 57. That interpretation flowed not only from the statutory text, but from the structure of the CWA as a whole, and its primary reliance on the federal government and the States for enforcement. Private suits are authorized only when state or federal officials are not actively pursuing matters, and when those officials are not suing because the discharges have ceased, there is no valid role for private suits. As the Court recognized, allowing private citizens to sue for "wholly past

violations of the Act" would "undermine the supplementary role envisioned for the citizen suit," turning it from a backstop measure for stopping ongoing violations into an expansive license to prosecute long-ago spills, and "would change the nature of the citizens' role from interstitial to potentially intrusive." *Id.* at 60-61. That result is simply not what Congress intended. *Id.* at 61.

That result, however, is exactly what the decision below invites. The majority recognized that under *Gwaltney*, the CWA authorizes a citizen suit "only to abate a 'continuous or intermittent' violation," and authorizes "'prospective relief' that only can be attained while a violation is ongoing and susceptible to remediation." App.12-13 (quoting *Gwaltney*, 484 U.S. at 57, 64). That standard is manifestly not satisfied here, as the leak here was fixed years before respondents sued. To get around that problem, the Fourth Circuit radically reconceptualized what constitutes a violation of the CWA, insisting that the CWA "does not require that the point source continue to release a pollutant for a violation to be ongoing." App.15. Instead, the court concluded, the "relevant violation" continues as long as there is an ongoing "addition [of pollutants] to navigable waters"—that is, as long as contaminants from the initial discharge continue to percolate through groundwater to navigable water, even if the discharge itself ceased to be "ongoing" years earlier. App.15-16.

That marvel of linguistic gymnastics not only flunks as a textual matter, but ignores all the structural considerations that led the *Gwaltney* Court to conclude the CWA does not countenance citizen

suits based on past violations. Allowing citizens to sue for any past discharge as long as they can find some trace of contamination that is still moving into navigable waters would again "undermine the supplementary role envisioned for the citizen suit." *Gwaltney*, 484 U.S. at 60. It would allow citizen suits in situations where government officials are not pursuing remedies, not for any lack of vigilance, but for the rather obvious reason that the discharge has ceased. That is not what this Court envisioned when it decided *Gwaltney*, and is certainly not what Congress envisioned when it enacted the CWA.

More fundamentally, the Fourth Circuit's dramatic expansion of what constitutes an *ongoing* violation of the CWA is just a symptom of its radical expansion of the CWA's jurisdictional reach. It is precisely because the "direct hydrological connection" test eliminates the need for any actual discharge from a point source into navigable waters that the Fourth Circuit was able to find an "ongoing violation" without any ongoing discharge. In the Fourth Circuit's view, so long as pollutants are "reaching navigable waters," the CWA applies. App.19, 26. That, of course, is not remotely the statutory scheme Congress enacted. Congress' scheme prohibits only the unpermitted "discharge of any pollutant … to navigable waters from any point source." 33 U.S.C. §1362(12). The lingering seepage through soil and groundwater of pollutants from a long-ago-ceased spill cannot plausibly be understood as an "ongoing discharge" from the only plausible point source (the pipeline) to navigable waters.

In addition to being flatly inconsistent with both *Gwaltney* and the CWA, the decision below conflicts with the Fifth Circuit's decision in *Hamker*, as the panel majority acknowledged. App.17-18 & n.9. *Hamker* held that "a past discharge of oil … with continuing negative effects," does not constitute an ongoing violation of the CWA. 756 F.2d at 394. Other federal courts have taken the same view of the "continuous or intermittent violation" requirement. *See, e.g.*, App.41-42 (citing cases); *Day, LLC v. Plantation Pipe Line Co.*, No. 2:16-cv-00429-LSC, 2018 WL 2572750, at *12 (N.D. Ala. June 4, 2018); *Aiello v. Town of Brookhaven*, 136 F. Supp. 2d 81, 120-21 (E.D.N.Y. 2001); *Wilson v. Amoco Corp.*, 33 F. Supp. 2d 969, 975 (D. Wyo. 1998) (acknowledging division of authority, and holding that "migration of residual contamination from previous releases does not constitute an ongoing discharge"); *accord Friends of Santa Fe Cty. v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1354 (D.N.M. 1995).

Gwaltney and the decisions faithfully applying that precedent have it right. Indeed, the decision below creates an "even more disturbing anomaly" than the one this Court refused to create in *Gwaltney*. 484 U.S. at 60. For the reasons explained, the CWA should not be interpreted to extend to discharges into soil or groundwater at all. *See supra* pp.15-29. But if the statute is to stretch that far, then at the very least it must be limited to cases where the point source is actually discharging pollutants, not extended to any and every past discharge where some pollutant may still linger near a stream.

III. The Questions Presented Are Exceptionally Important And Have Wide-Ranging Impact.

The questions presented have implications far beyond this case. If left intact, the Fourth Circuit's decision will expand the NPDES permitting program to countless sources that have operated for years without any suggestion that they might require an NPDES permit. And the owners of those suddenly regulated sources—including businesses and municipalities running wastewater treatment plants, infrastructure projects that use stormwater or recycled water to restore depleted groundwater levels, and even the millions of homeowners with septic tank systems—could face crippling civil penalties for failing to obtain a costly and never-before-required permit. That "immense expansion of federal regulation" to millions of previously unregulated parties, without any clear congressional authorization or fair warning to the parties affected, readily warrants this Court's review. *Rapanos*, 547 U.S. at 722 (plurality opinion); *cf. Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (reversing decision that would work "an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization").

The decision below also creates enormous uncertainty for individuals and entities attempting to determine whether sources they own are covered. The decision provides little if any practical guidance on how to determine whether an alleged "hydrological connection" between a point source and a navigable water is sufficiently "direct." *See* App.22-26. Instead of providing the "clarity and predictability" that is

vitally important in this regulatory context, *see Sackett v. EPA*, 566 U.S. 120, 133 (2012) (Alito, J., concurring), the standard adopted below will ensure the only certainty is increased regulatory confusion. That is especially problematic in this context, since obtaining an NPDES permit imposes substantial burdens and costs. *See Hawkes*, 136 S. Ct. at 1812, 1815. Immediate review will end that uncertainty and save potentially regulated parties from being forced to choose between obtaining a costly permit they should not need and risking massive penalties for things the CWA was not meant to cover.

Granting review also will avoid incalculable amounts of unnecessary work for regulators in attempting to devise new NPDES permits to regulate groundwater pollution. As Judge Floyd observed in dissent, the NPDES permitting program is hopelessly "ill-equipped to address … nonpoint source pollution." App.36. The permits are designed to impose "effluent limitations" on "discernible, confined and discrete conveyance[s]," 33 U.S.C. §1362(12), not to regulate discharges into groundwater followed by seepage through diffuse underground geological channels. It is likewise unclear how courts can craft appropriate remedies for the alleged seepage of pollutants through groundwater under the CWA—particularly when the CWA is radically expanded to treat that seepage as an "ongoing violation" even in the absence of any ongoing discharge. This is a case in point. How exactly Kinder Morgan is supposed to apply for a permit for the lingering seepage of long-ago-spilled gasoline through soil and groundwater, respondents have never explained.

The answer, of course, is that respondents have not invoked the CWA in hopes of requiring Kinder Morgan to obtain a permit. They have invoked the CWA in hopes of getting a federal court to seize control over the ongoing state-supervised remediation of the spill, despite having already exercised their opportunity to provide input into the remediation through the state-provided comment period. The recent *TVA* case is also instructive. There, too, plaintiffs brought suit under the CWA complaining about the adequacy of state efforts to address the seepage of pollutants through groundwater in the absence of any ongoing discharge—in that case, the seepage of lingering pollutants underneath a long-ago-closed dry ash disposal site that is now a heavily vegetated plot of land. After the district court sided with the plaintiffs, the court did not order TVA to get an NPDES permit; it instead ordered TVA to "excavate the coal ash waste" from the soil and groundwater entirely. 273 F. Supp. 3d at 848. That may be an appropriate remedy under RCRA, CERCLA, or their state-law analogs, but it makes no sense whatsoever under the NPDES permitting program.

The decision below thus not only will force regulated entities to waste substantial resources applying for NPDES permits in circumstances that Congress never intended, but ultimately will allow the NPDES permitting scheme to swallow whole the myriad other state and federal regulatory schemes designed to address environmental remediation. Congress never intended the CWA's permitting requirement to solve all the nation's pollution problems. It intended that scheme to address one—

and only one—type of pollution: the discharge of pollutants from a point source into navigable waters. This Court should grant certiorari to resolve the conflicts to which the decision below contributes and to restore the CWA to its intended scope.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
C. HARKER RHODES IV
LAUREN N. BEEBE
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Petitioners

August 28, 2018

APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-1640

UPSTATE FOREVER; SAVANNAH RIVERKEEPER,

Plaintiffs-Appellants,

v.

KINDER MORGAN ENERGY PARTNERS, L.P.;
PLANTATION PIPE LINE COMPANY, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the District of South Carolina,
No. 8:16-cv-04003-HMH

Argued: December 7, 2017
Decided: April 12, 2018

Before GREGORY, Chief Judge, and KEENAN
and FLOYD, Circuit Judges

OPINION

BARBARA MILANO KEENAN, Circuit Judge:

In late 2014, several hundred thousand gallons of gasoline spilled from a rupture in a pipeline owned by Plantation Pipe Line Company, Inc., a subsidiary of

Kinder Morgan Energy Partners, LP (collectively, Kinder Morgan), near Belton, South Carolina. It is undisputed that the gasoline has seeped into nearby waterways, and the plaintiffs allege that the gasoline has continued to travel a distance of 1000 feet or less from the pipeline to those "navigable waters."

Two plaintiff conservation groups brought a "citizen suit" under the Clean Water Act (the CWA, or the Act), 33 U.S.C. §§ 1251-1387, alleging that Kinder Morgan was in violation of the Act for polluting navigable waters without a permit and seeking relief to remediate the ongoing pollution. This case requires us to determine whether citizens may bring suit alleging a violation of the CWA when the source of the pollution, the pipeline, is no longer releasing the pollutant, but the pollutant allegedly is passing a short distance through the earth via ground water and is being discharged into surface waterways.

The district court held that it lacked subject matter jurisdiction under the CWA, because the pipeline has been repaired and the pollutants currently pass through ground water to reach navigable waters. We conclude that the district court erred in holding that it lacked jurisdiction, because citizens may bring suit under 33 U.S.C. § 1365(a) for discharges of pollutants that derive from a "point source" and continue to be "added" to navigable waters. We further hold that the plaintiffs have stated a valid claim for a discharge under the CWA. Accordingly, we vacate the district court's judgment, and remand for further proceedings consistent with this opinion.

I.

A.

In 1972, Congress enacted the CWA to eliminate the discharge of certain pollutants or "effluents" into the "navigable waters" of the United States. *See S. Appalachian Mountain Stewards v. A & G Coal Corp.*, 758 F.3d 560, 563 (4th Cir. 2014); *Piney Run Pres. Ass'n v. Cty. Comm'rs of Carroll Cty.*, 268 F.3d 255, 264-65 (4th Cir. 2001). The CWA's stated purpose is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The federal government's prior regime of water pollution control focused primarily on measuring direct injuries to the Nation's waters using water quality standards. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 151 (4th Cir. 2000) (en banc) [*Friends of the Earth II*]. In the CWA, however, Congress shifted its regulatory focus for water pollution from water quality standards to limiting discharges of pollutants. *See id.* One of the CWA's central provisions establishes that "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a).

The Act authorizes exceptions to this general prohibition in the form of permits issued in accordance with the National Pollutant Discharge Elimination System (NPDES), which allows limited discharges. *See* 33 U.S.C. §§ 1311(a), 1342; *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004) ("[T]he NPDES requires dischargers to obtain permits that place limits on the type and quantity of pollutants."); *Friends of the Earth II*, 204 F.3d at 151. Both the Environmental Protection Agency (EPA) and

state environmental control agencies may issue NPDES permits. *See Friends of the Earth II*, 204 F.3d at 152. However, consistent with the CWA's general prohibition, a polluter does not violate the statute only when it exceeds limitations in its permit. Instead, a polluter also may be in violation of the statute due to a discharge for which the polluter could not have obtained *any* permit. *See Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 561 (5th Cir. 1996) ("Nothing in the CWA limits a citizen's right to bring an action against a person who is allegedly discharging a pollutant without a permit solely to those cases where EPA has promulgated an effluent limitation or issued a permit that covers the discharge.").

The CWA authorizes both citizens and government agencies to enforce the Act's provisions. Citizen suits under the CWA have the "central purpose of permitting citizens to abate pollution when the government cannot or will not command compliance." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 62 (1987). The Act contains the following citizen suit provision:

> [A]ny citizen may commence a civil action on his own behalf—
>
> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is *alleged to be in violation of* . . . an effluent standard or limitation under this chapter . . . .

33 U.S.C. § 1365(a) (emphasis added). An "effluent standard or limitation" is defined to include the Act's central prohibition on the "discharge of any pollutant" without a permit. *See* 33 U.S.C. §§ 1365(f), 1311(a).

The Act sets forth a technical definition of the term "discharge of a pollutant," which is defined expansively to include "any addition of any pollutant to navigable waters from any point source."[1] 33 U.S.C. § 1362(12)(A). A "point source" in turn is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, [or] container . . . ." 33 U.S.C. § 1362(14). The term "navigable waters" is defined in the CWA as "the waters of the United States." 33 U.S.C. § 1362(7). The Supreme Court has interpreted the term "navigable waters" to mean more than waters that are navigable-in-fact, and to include, for example, wetlands and related hydrological environs. *See, e.g.*, *Rapanos v. United States*, 547 U.S. 715, 730-31, 735 (2006) (plurality opinion) (observing that navigable waters include more than traditionally navigable waters and may include certain wetlands); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) ("Congress chose to define the waters covered by the Act broadly.").

---

[1] Although Section 1311(a) refers to the "discharge of any pollutant" and Section 1362(12)(A) defines "discharge of a pollutant," we construe these two terms to be substantively identical and refer to the "discharge of a pollutant."

B.

The plaintiffs Upstate Forever and the Savannah Riverkeeper[2] (collectively, the plaintiffs) allege that in late 2014, over 369,000 gallons of gasoline spilled from Kinder Morgan's underground pipeline, which extends over 1100 miles through parts of the eastern United States. In December 2014, citizens in Anderson County, South Carolina, discovered dead plants, a petroleum odor, and pools of gasoline in the vicinity of the pipeline. The plaintiffs allege that gasoline and gasoline toxins have seeped and continue to seep into ground water, wetlands, and waterways in Anderson County and the Savannah River watershed. They allege that although a reported 209,000 gallons were recovered by the end of 2015, no significant amount of contaminants has been removed since that time. Consequently, at the time that the plaintiffs filed their complaint, at least 160,000 gallons allegedly remained unrecovered. Kinder Morgan repaired the pipeline shortly after the initial spill.

When Kinder Morgan's pipeline broke six to eight feet underground, gasoline and related contaminants spilled out into soil and ground water. The plaintiffs allege that these contaminants are seeping into two nearby tributaries of the Savannah River, Browns

---

[2] Upstate Forever and the Savannah Riverkeeper are non-profit public interest organizations that operate in Anderson County, South Carolina, where the spill occurred. Upstate Forever has stated goals of developing clean water in the Upstate region of South Carolina, and the Savannah Riverkeeper works to restore the lakes and tributaries in the Savannah River watershed.

Creek and Cupboard Creek, and their adjacent wetlands. The pipeline broke less than 1000 feet from Browns Creek and its adjacent wetland, and 400 feet from Cupboard Creek and a second wetland. Both waterways and the wetlands are downgradient from the spill site. The plaintiffs allege that gasoline pollutants from the pipeline are seeping into navigable waters as defined by the CWA, including the above two creeks in Anderson County, Broadway Lake, Lake Secession, Lake Russell, and the Savannah River.[3]

The plaintiffs allege that a "plume" of petroleum contaminants continues to migrate into these waterways years later through ground water and various natural formations at the spill site, including "seeps, flows, fissures, and channels." Hazardous gasoline contaminants have been detected on several occasions at the spill site in ground water wells. Contaminants were also detected in Browns Creek as early as January 2015, and additional tests in Browns Creek have reported high levels of contaminants on several later dates in 2015 and in 2016.

Kinder Morgan has implemented certain remediation and recovery measures under the guidance of the South Carolina Department of Health and Environmental Control (DHEC). DHEC is the agency authorized to issue NPDES permits and oversee water quality in South Carolina. *See Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*,

---

[3] Kinder Morgan does not challenge the plaintiffs' allegation that these waters, including Browns Creek, Cupboard Creek, and their adjacent wetlands, constitute navigable waters as defined by the CWA. 33 U.S.C. § 1362(7).

629 F.3d 387, 390 (4th Cir. 2011) [*Friends of the Earth III*]; S.C. Code § 48-1-100(B).

The plaintiffs allege that Kinder Morgan has failed to comply fully with DHEC's abatement instructions. They claim that although DHEC instructed Kinder Morgan to test for pollution in March 2016, Kinder Morgan only began that additional testing after the plaintiffs made their own visit to the spill site in August 2016. The plaintiffs further allege that their testing conducted in August 2016 revealed that the levels of gasoline contaminants in Browns Creek actually were increasing almost two years after the spill. During their August 2016 visit to the area, oil sheens were visible on the surface of Browns Creek, and devices used to absorb the oil had not been maintained and were saturated with oil.

Kinder Morgan allegedly delayed by six months its submission to DHEC of the required site remediation plan and site assessment, and also refused to comply with another of DHEC's water sampling requests. Publicly available data on DHEC's website indicate that DHEC sampled surface waters at Browns Creek in February 2017 and found pollutants at three locations, each of which is being remediated. South Carolina Department of Health and Environmental Control, *Surface Water Sampling Event*, http://www.scdhec.gov/HomeAndEnvironment/Pollution/CleanUpPrograms/OngoingProjectsUpdates/PlantationPipeline/SurfaceWaterSamplingEvent/ (last visited Apr. 11, 2018).

The plaintiffs filed this suit in December 2016, alleging discharges of gasoline and gasoline pollutants without a permit, in violation of the CWA under 33

U.S.C. § 1311(a).[4] The complaint includes allegations that the pipeline ruptured and caused a discharge that has polluted, and continues to pollute, navigable waters by seeping from a point source over a distance of 1000 feet or less through soil and ground water to nearby tributaries and wetlands. The plaintiffs thus allege in their complaint two interrelated violations of the CWA: (1) that Kinder Morgan has caused discharges of pollutants from point sources to navigable waters without a permit; and (2) that Kinder Morgan has caused discharges of pollutants that continue to pass through ground water with a "direct hydrological connection" to navigable waters. The plaintiffs also allege that the remediation actions taken to date by Kinder Morgan have been insufficient to abate the pollution, and seek damages, declaratory relief, and injunctive relief requiring that Kinder Morgan take further measures to control and abate the spill.

Kinder Morgan moved to dismiss the plaintiffs' complaint under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, contending both that the district court lacked subject matter jurisdiction and that the plaintiffs had failed to state a claim for relief. Addressing first the sufficiency of the plaintiffs' pleadings, the district court held that the plaintiffs had failed to state a claim because the pipeline had been repaired and no longer was discharging

---

[4] Kinder Morgan does not contend that gasoline and related contaminants are not pollutants under the CWA. *See United States v. Hamel*, 551 F.2d 107, 110-11 (6th Cir. 1977) (holding that the CWA definition of "pollutant" covers gasoline discharges).

pollutants "directly" into navigable waters. The court also held that it lacked subject matter jurisdiction over the complaint, stating that the CWA did not encompass the movement of pollutants through ground water that is hydrologically connected to navigable waters. Accordingly, the court dismissed the plaintiffs' complaint on both grounds. The plaintiffs timely noted this appeal.

II.

On appeal, the plaintiffs contend that the district court erred in determining that the continuing addition of pollutants to navigable waters is not an ongoing violation of the CWA because the pipeline has been repaired. According to the plaintiffs, a claim for a discharge of a pollutant, in violation of 33 U.S.C. § 1311(a), need not allege that the pollutant is being discharged *directly* from the point source into navigable waters. They assert that the CWA also prohibits the discharge of pollutants from a point source through ground water that has a direct hydrological connection to navigable waters.

In response, Kinder Morgan contends that the district court did not err because the violation ceased once the pipeline was repaired. Alternatively, Kinder Morgan asserts that if seepage is ongoing, the pollution is seeping from nonpoint sources, namely, from natural formations at the spill site. Kinder Morgan also argues that discharges into navigable waters from hydrologically connected ground water do not fall within the CWA's definition of a "discharge of a pollutant" in 33 U.S.C. § 1362(12)(A). We disagree with Kinder Morgan's position.

A.

We review de novo the district court's dismissal of the complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). *Greenhouse v. MCG Capital Corp.*, 392 F.3d 650, 655 (4th Cir. 2004); *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768-69 (4th Cir. 1991). A district court should grant a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) "only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Evans v. B.F. Perkins Co., a Div. of Standex Int'l Corp.*, 166 F.3d 642, 647 (4th Cir. 1999) (citation omitted). To survive a motion to dismiss under Rule 12(b)(6), a plaintiff must "provide[] sufficient detail [ ] to show that he has a more-than-conceivable chance of success on the merits." *Owens v. Balt. City State's Attorneys Office*, 767 F.3d 379, 396 (4th Cir. 2014) (citation omitted).

As a threshold matter, a court first must determine whether it has jurisdiction to entertain a claim. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-89 (1998). A court's determination of subject matter jurisdiction addresses whether the court has the authority to entertain a particular kind of case, not whether a claim for relief is viable under a particular construction of a statute. *See id.* at 89. Unless Congress has "clearly state[d] that [a statutory limitation] is jurisdictional . . . courts should treat the restriction as nonjurisdictional in character." *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013) (citations and internal quotation marks omitted).

In the present case, the primary issue we consider is whether an indirect discharge of a pollutant through ground water, which has a direct hydrological connection to navigable waters, can support a theory of liability under the CWA. Because our answer to this question largely depends on our construction of the statutory term "discharge of a pollutant," the question ordinarily would not be jurisdictional in nature.[5] However, because courts have "jurisdiction" over CWA citizen suits only if the complaint alleges an ongoing violation, *Gwaltney*, 484 U.S. at 64, we must address the question of an ongoing violation before proceeding further in this case. Accordingly, we first address whether the plaintiffs have alleged an ongoing violation and, if so, whether they sufficiently have alleged a nexus between the source of the pollution and navigable waters to state a claim for discharge of a pollutant under the CWA. *See Steel Co.*, 523 U.S. at 88-90.

B.

The CWA authorizes citizens to seek injunctive relief only to abate a "continuous or intermittent" violation. *Gwaltney*, 484 U.S. at 64; *Friends of the Earth III*, 629 F.3d at 402 ("We have instructed that a citizen plaintiff can prove an ongoing violation . . . by

---

[5] Had the plaintiffs alleged that ground water, of itself, falls within the meaning of navigable waters under the CWA, we would be confronting a distinctly different question here. *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 180 (2001) (referring to "navigable waters" as a "traditional jurisdictional term"). However, in this case, the plaintiffs have alleged only that Kinder Morgan discharged pollutants "*via* hydrologically connected groundwater to surface waters" (emphasis added).

proving violations that continue on or after the date the complaint is filed." (citation omitted)). Conversely, when a violation of the CWA is "wholly past," the federal courts do not have jurisdiction to entertain a citizen suit, even if the past discharge violated the CWA. *Gwaltney*, 484 U.S. at 64. As we already have noted, the CWA's citizen suit provision is intended primarily to allow citizens "to abate pollution when the government cannot or will not command compliance." *Id.* at 62; *cf. Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 17 n.27 (1981) ("[P]rivate enforcement suits were intended [often] to be limited to [ ] injunctive relief."). The citizen suit provision thus enables citizens to seek abatement of polluting discharges to further the CWA's central purpose, namely, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

In *Gwaltney*, the Supreme Court emphasized that the CWA, like other environmental statutes, authorizes "prospective relief" that only can be attained while a violation is ongoing and susceptible to remediation. 484 U.S. at 57; *see also, e.g.*, 15 U.S.C. § 2619(a)(1) (authorizing citizen suits against persons "alleged to be in violation of" the statute); 42 U.S.C. § 6972 (same). We applied the principles of *Gwaltney* in our decision in *Goldfarb v. Mayor of Baltimore*, holding that a claim of an ongoing violation supported a citizen suit under the Resource Conservation and Recovery Act of 1976 (RCRA), Pub. L. No. 94-580, 90 Stat. 2796 (1976) (codified as amended at 42 U.S.C. §§ 6901-6992k), under a provision that is "identical" to the citizen suit authorization in the CWA. 791 F.3d 500, 513 (4th Cir. 2015).

The plaintiffs in *Goldfarb* alleged that the City of Baltimore had stored hazardous chemicals, which had leaked from the point of storage and had continued to migrate through the soil in violation of the RCRA's permitting standards. *Id.* at 512. In response to the City's contention that any RCRA violations were wholly past under the rationale of *Gwaltney*, we observed that "although a defendant's *conduct* that is causing a *violation* may have ceased in the past . . . what is relevant is that the *violation* is continuous or ongoing." *See id.* at 511-13 (citing *S. Rd. Assocs. v. IBM Corp.*, 216 F.3d 251, 255 (2d Cir. 2000)). Accordingly, we held that the plaintiffs had alleged an ongoing violation of the RCRA. *Id.*

Our analysis in *Goldfarb* regarding an ongoing violation is equally applicable here.[6] Nothing in the language of the CWA suggests that citizens are barred from seeking injunctive relief after a polluter has repaired the initial cause of the pollution. When interpreting a statute, we attend first to the statute's plain language. *United States v. Ide*, 624 F.3d 666, 668 (4th Cir. 2010). Like the RCRA, the CWA's plain language requires only that the citizen allege that the polluter "be in violation of" an "effluent standard or limitation" under the Act. 33 U.S.C. § 1365(a); *see Goldfarb,* 791 F.3d at 512-13. As noted above, an "effluent limitation" of the CWA includes any unpermitted "discharge of a pollutant." 33 U.S.C.

---

[6] We disagree with the dissent's view that our decision in *Goldfarb* is not helpful. We held in *Goldfarb* under an identical citizen suit provision that conduct causing a violation need not be ongoing to state a claim, so long as the violation itself is ongoing. 791 F.3d at 513.

§§ 1365(f), 1311(a). Accordingly, the relevant violation here is the discharge of a pollutant, defined in the Act as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A).

Kinder Morgan's gasoline pipeline unambiguously qualifies as a point source.[7] 33 U.S.C. § 1362(14) (defining a point source to include a "pipe" or "conduit"). The plaintiffs claim that pollutants originating from this point source continue to be "added" to bodies of water that allegedly are navigable waters under the Act, including the two creeks in Anderson County, adjacent wetlands, Broadway Lake, Lake Secession, Lake Russell, and the Savannah River watershed. The CWA's language does not require that the point source continue to release a pollutant for a violation to be ongoing. The CWA

---

[7] Under the dissent's view, pollution becomes "nonpoint source pollution" not covered by the CWA at the moment when the point source no longer actively releases the pollutant. *See, e.g.*, *ONRC Action v. U.S. Bureau of Reclamation*, 798 F.3d 933, 936 (9th Cir. 2015) (noting that the CWA provides no direct mechanism for regulating "nonpoint source pollution"). We are not persuaded by this argument, because the plaintiffs adequately have alleged that the pipeline is *a* point source of the discharge, which satisfies the CWA's requirement that the alleged pollution be "from *any* point source." *See* 33 U.S.C. § 1362(12)(A) (emphasis added). Moreover, the cases relied on by the dissent show that nonpoint source pollution arises from "dispersed activities over large areas, and is not traceable to any single discrete source." *See, e.g.*, *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1184 (9th Cir. 2002); *see also* 33 U.S.C. 1314(f) (providing examples of nonpoint source pollution, including "agricultural and silvicultural activities"). The plaintiffs here allege that the pollution is traceable not to dispersed activities and nonpoint sources but to Kinder Morgan's pipeline, a discrete source.

requires only that there be an ongoing "addition . . . to navigable waters," regardless whether a defendant's conduct causing the violation is ongoing. 33 U.S.C. § 1362(12)(A). *See Goldfarb*, 791 F.3d at 513; *IBM Corp.*, 216 F.3d at 254 (noting under identical RCRA citizen suit provision that "defendant's current activity at the site is not a prerequisite for finding a current violation").

The CWA's term "discharge of a pollutant" is a statutory term of art precisely defined in the CWA. *Cf. Riverside Bayview Homes, Inc.*, 474 U.S. at 133 (noting that statutory definition of "navigable waters" in CWA makes ordinary meaning of those words less important). The definition does not place temporal conditions on the discharge of a pollutant from a point source. Nor does the definition limit discharges under the Act to additions of pollutants to navigable waters from a point source that continues actively to release such pollutants. Instead, the precondition for alleging a cognizable discharge of a pollutant is only that the plaintiff allege an ongoing addition to navigable waters originating from a point source. 33 U.S.C. § 1362(12)(A). Moreover, as we explain below, the CWA is not limited to discharges of pollutants "directly" from the point source to navigable waters. *See, e.g.*, *Hawai'i Wildlife Fund v. Cty. of Maui*, No. 15-17447, 2018 WL 1569313, at *7-*8 (9th Cir. Feb. 1, 2018). Necessarily, when a discharge is indirect, there will be a delay between the time at which pollution leaves the point source and the time at which it is added to navigable waters. However, nothing in the CWA's language indicates that such a delay prevents the pollution from constituting an ongoing violation for purposes of a citizen suit, as long as pollutants

continue to be "added" to navigable waters. *See* 33 U.S.C. § 1362(12)(A). The plaintiffs have alleged such an ongoing addition here.

The CWA is a strict liability statute. *Friends of the Earth II,* 204 F.3d at 151. As noted above, Congress set forth in the Act its intention that "the discharge of pollutants into the navigable waters be eliminated," 33 U.S.C. § 1251(a)(1), not that the originating source of pollutants be corrected. Thus, remedial efforts taken in good faith "do[] not *ipso facto* establish the absence of federal jurisdiction over a citizen suit." *Am. Canoe Ass'n v. Murphy Farms*, 412 F.3d 536, 540 (4th Cir. 2005). To protect the nation's waters under the CWA, abatement of a pollutant requires more than the repair of a pipeline, and the need for such abatement continues so long as the contaminant continues to flow into navigable waters. *See Gwaltney*, 484 U.S. at 62 (explaining that CWA's citizen suit provision has "the central purpose of permitting citizens to abate pollution"). Thus, the fact that a ruptured pipeline has been repaired, of itself, does not render the CWA violation wholly past.[8]

Our conclusion is not altered by Kinder Morgan's citation to cases from other circuits. Those decisions were based on materially different facts. For example,

---

[8] The dissent relies on *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133 (10th Cir. 2005), for its conclusion that this is an "ongoing migration" case that does not fall under the CWA's citizen suit provision. However, that court did not hold that an ongoing migration of pollutants cannot constitute a continuing violation of the CWA, but rather noted that the case before the court did not involve a simple ongoing migration of pollutants. *Id.* at 1140.

in *Hamker v. Diamond Shamrock Chemical Co.,* the Fifth Circuit examined a complaint containing allegations of a discharge of oil into ground water from the defendant's pipe, rather than a discharge reaching navigable waters. *See* 756 F.2d 392, 397 (5th Cir. 1985).

As the court observed, the complaint alleged only that the discharged oil was "leaking into ground water" and "grasslands," not into navigable waters.[9] *Id.* Likewise, the Second Circuit held that continuing decomposition of "lead shot" in the Long Island Sound is not a "present violation" of the CWA. *Conn. Coastal Fishermen's Ass'n v. Remington Arms Co.*, 989 F.2d 1305, 1312-13 (2d Cir. 1993). That holding pertained to whether the continuing effects of pollutants *already* "deposited" into a navigable water constituted a continuing violation. *Id.* at 1313. In contrast, the plaintiffs allege here that pollutants *continue to be added to* navigable waters, a violation encompassed within the Act's statutory definition. Accordingly, we conclude that the plaintiffs have alleged an ongoing violation of 33 U.S.C. § 1311(a), and that the district court erred in dismissing their complaint for lack of subject matter jurisdiction.

---

[9] Moreover, to the extent that *Hamker*'s reasoning suggests that an ongoing violation requires that the point source continually discharge a pollutant, *Hamker* contravenes our decision in *Goldfarb*, and we decline to adopt the Fifth Circuit's approach. *See Goldfarb*, 791 F.3d at 513.

C.

i.

We turn to consider the question of first impression in this Circuit whether a discharge of a pollutant that moves through ground water before reaching navigable waters may constitute a discharge of a pollutant, within the meaning of the CWA. Initially, we observe that a discharge of a pollutant under the Act need not be a discharge "directly" to a navigable water from a point source. In *Rapanos v. United States*, the Supreme Court considered the kinds of connected waters covered by the CWA. *See* 547 U.S. at 732-38. Justice Scalia, writing for a plurality of four Justices, concluded that certain wetlands and intermittent streams did not themselves fall within the meaning of navigable waters under the CWA.[10] *See id.* at 739. However, when analyzing the

[10] The district court here rejected the plaintiffs' argument that the CWA covers a discharge through soil and ground water, because the court concluded that such an argument relies on an impermissible "Land is Waters" approach to CWA jurisdiction. In reaching this conclusion, the district court relied on the plurality opinion in *Rapanos*, which characterized the plaintiffs' theory there that "intermittent streams" were navigable waters as a so-called "Land is Waters" approach, and rejected that approach. 547 U.S. at 732-34. However, Justice Kennedy's controlling concurrence in *Rapanos* did not join the plurality in rejecting the plaintiffs' theory as a "Land is Waters" approach to CWA jurisdiction. 547 U.S. at 768-70; *United States v. Robertson*, 875 F.3d 1281, 1292 (9th Cir. 2017) (holding that Justice Kennedy's "significant nexus" test controls after *Rapanos*). Moreover, the "Land is Waters" theory in *Rapanos* involved whether certain bodies of water themselves qualified as navigable waters, which is not at issue here. 547 U.S. at 739 (plurality opinion). Thus, irrespective whether a "Land is Waters" approach remains viable

kinds of connected waters that might fall under the CWA, Justice Scalia observed that "[t]he Act does not forbid the 'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters.'" *Id.* at 743 (quoting 33 U.S.C. § 1362(12)(A)). Accordingly, he observed that federal courts consistently have held that a discharge of a pollutant "that naturally washes downstream likely violates § 1311(a)." *Id.* (emphasis removed) (citing *United States v. Velsicol Chem. Corp.*, 438 F. Supp. 945, 946-47 (W.D. Tenn. 1976)).

The plain language of the CWA requires only that a discharge come "from" a "point source." *See* 33 U.S.C. § 1362(12)(A). Just as the CWA's definition of a discharge of a pollutant does not require a discharge directly to navigable waters, *Rapanos*, 547 U.S. at 743, neither does the Act require a discharge directly from a point source,[11] *see* 33 U.S.C. § 1362(12)(A). The word

---

under the CWA following *Rapanos*, the plaintiffs' theory in the present case does not rely on such an approach.

[11] The dissent relies on cases that include language stating that a point source must "convey" or "introduce" pollutants to navigable waters. *See, e.g.*, *Miccosukee*, 541 U.S. at 105 (observing that "a point source . . . need only convey the pollutant to 'navigable waters'"); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of N.Y.*, 273 F.3d 481, 491 (2d Cir. 2001) (stating that a "point source must introduce the pollutant into navigable water" (emphasis omitted) (citation omitted)). We disagree with any suggestion that these cases support the conclusion that the CWA requires a discharge from the point source directly to navigable waters. First, these cases simply did not confront the question of an indirect discharge of pollutants through land or ground water over time. Second, many of these cases were decided before *Rapanos* clarified that the CWA's language does not require a direct discharge. *See* 547 U.S. at 743;

"from" indicates "a starting point: as (1) a point or place where an actual physical movement . . . *has its beginning*." Webster's Third New International Dictionary 913 (Philip Babcock Gove et al. eds., 2002) (emphasis added); *see also* The American Heritage Dictionary of the English Language 729 (3d ed. 1992) (noting "from" indicates a "starting point" or "cause"). Under this plain meaning, a point source is the starting point or cause of a discharge under the CWA, but that starting point need not also convey the discharge directly to navigable waters.

To hold otherwise effectively would require that any discharge of a pollutant cognizable under the CWA be seamlessly channeled by point sources until the moment the pollutant enters navigable waters. The Second Circuit rejected such an interpretation of the CWA, and we agree with that court's reasoning. In *Waterkeeper Alliance, Inc. v. EPA*, the Second Circuit held that if courts required both the cause of the pollution *and* any intervening land to qualify as point sources, such an interpretation would, in practice, "impose a requirement not contemplated by the Act: that pollutants be channelized not once but twice before the EPA can regulate them." 399 F.3d 486, 510-11 (2d Cir. 2005); *see also Concerned Area Residents for Env't v. Southview Farm*, 34 F.3d 114, 119 (2d Cir. 1994) (holding that liquid manure that passed from tankers through intervening fields to nearby waters constituted a discharge from a point source). The

---

Hawai'i Wildlife Fund, 2018 WL 1569313, at *7-*8. Finally, as we explain below, the point source here allegedly *is* "conveying" and "introducing" pollutants to the navigable waters, albeit indirectly, because it is the undisputed cause of the addition.

Ninth Circuit likewise rejected the theory that the CWA creates liability for discharges "only . . . where the point source itself directly feeds into the navigable water—e.g., via a pipe or a ditch." *Hawai'i Wildlife Fund*, 2018 WL 1569313, at *7.

The logic of *Waterkeeper Alliance* and *Hawai'i Wildlife Fund* is equally applicable here. The plaintiffs have alleged that the pipeline is the starting point and cause of pollution that has migrated and is migrating through ground water to navigable waters. Accordingly, we hold in agreement with the Second and Ninth Circuits that to qualify as a discharge of a pollutant under the CWA, that discharge need not be channeled by a point source until it reaches navigable waters.

ii.

Although we conclude that an indirect discharge may fall within the scope of the CWA, such discharges must be sufficiently connected to navigable waters to be covered under the Act. As the Ninth Circuit recently held, a discharge that passes from a point source through ground water to navigable waters may support a claim under the CWA. *Hawai'i Wildlife Fund*, 2018 WL 1569313, at *8. However, a discharge through ground water does not always support liability under the Act. *Id.* Instead, the connection between a point source and navigable waters must be clear.

The EPA has developed the term "direct hydrological connection" to identify for purposes of the CWA whether there is a clear connection between the discharge of a pollutant and navigable waters when the pollutant travels through ground water. The EPA

consistently has taken the position that the Act applies to discharges "from a point source via ground water that has a direct hydrologic connection to surface water." National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2960, 3015 (proposed Jan. 12, 2001) [CAFOs Standards]; *see also* Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,892 (Dec. 12, 1991) ("[T]he Act requires NPDES permits for discharges to groundwater where there is a direct hydrological connection between groundwaters and surface waters."). The assessment of the directness of a hydrological connection is a "factual inquiry," in which "time and distance" are relevant, as well as factors such as "geology, flow, and slope." CAFOs Standards, 66 Fed. Reg. at 3017. This interpretation by the EPA of its statutory authority "warrants respectful consideration," especially in the context of a "complex and highly technical regulatory program." *Wis. Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 497 (2002) (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)); *see also Riverside Bayview Homes, Inc.*, 474 U.S. at 131.

In light of the above considerations, we hold that a plaintiff must allege a direct hydrological connection between ground water and navigable waters in order to state a claim under the CWA for a discharge of a

pollutant that passes through ground water.[12] This determination necessarily is fact-specific. In the present case, the plaintiffs have alleged that pollutants are seeping into navigable waters in Anderson County about 1000 feet or less from the pipeline. This extremely short distance, if proved, provides strong factual support for a conclusion that Kinder Morgan's discharge is covered under the CWA. *See Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1137, 1148-50 (10th Cir. 2005) (holding that a discharge that passed through a 2.5-mile tunnel between mine shaft and navigable water could be covered under CWA).

Also as a matter of undisputed fact, the ruptured pipeline caused the pollution at issue here. Kinder Morgan does not assert that the pollutants found in the creeks and wetlands have an independent or contributing cause. And this is not a case in which pollutants are diluted while passing through a labyrinth of underground "tunnel geology," *El Paso Gold Mines*, 421 F.3d at 1150, or are otherwise diverted from their natural course, *see Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45 (5th Cir. 1980) (holding that natural flow of "[g]ravity . . . resulting in

---

[12] The Ninth Circuit has held that an indirect discharge must be "fairly traceable" from the point source to navigable waters. *Hawai'i Wildlife Fund,* 2018 WL 1569313, at *8 n.3. We see no functional difference between the Ninth Circuit's fairly traceable concept and the direct hydrological connection concept developed by EPA that we adopt today, which as we explain below includes a concept of traceability. In fact, the direct hydrological connection concept may be viewed as a narrower application of the same principle, addressing point source discharges *through ground water*.

a discharge into a navigable body of water, may be part of a point source discharge if the [polluter] at least initially collected or channeled the water and other materials").

Additionally, the plaintiffs have alleged a traceable discharge from the ruptured pipeline. The traceability of a pollutant in measurable quantities is an important factor in the determination whether a particular discharge is covered by the CWA. *See Hawai'i Wildlife Fund,* 2018 WL 1569313, at *8 (holding that claim for indirect discharge must show that pollution is "fairly traceable" to the point source); *El Paso Gold Mines*, 421 F.3d at 1140 n.4 (noting that pollution that is "not traceable to a single, identifiable source or conveyance" is nonpoint source pollution). And Kinder Morgan does not dispute that pollutants originating from the gasoline pipeline *already* have been detected in the waters of Anderson County.

As we have noted, the CWA's stated purpose is "to restore . . . the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), and the statute establishes a regime of zero tolerance for unpermitted discharges of pollutants, 33 U.S.C. § 1311(a). In contrast, if the presence of a short distance of soil and ground water were enough to defeat a claim, polluters easily could avoid liability under the CWA by ensuring that all discharges pass through soil and ground water before reaching navigable waters. Such an outcome would greatly undermine the purpose of the Act. Thus, we hold that the plaintiffs plausibly have alleged a direct hydrological connection between the ground water and

navigable waters to state a claim for a discharge of a pollutant under 33 U.S.C. § 1311(a).

We find no merit in Kinder Morgan's concern that our holding will result in unintended coverage under the CWA of any discharge of a pollutant into ground water. We do not hold that the CWA covers discharges to ground water itself. Instead, we hold only that an alleged discharge of pollutants, reaching navigable waters located 1000 feet or less from the point source by means of ground water with a direct hydrological connection to such navigable waters, falls within the scope of the CWA.[13] Accordingly, the plain language and purpose of the Clean Water Act direct our conclusion in the present case that the district court has jurisdiction to entertain the plaintiffs' claim under 33 U.S.C. § 1365(a), and that the plaintiffs have stated a claim for a violation of the Act's prohibition of the "discharge of any pollutant." 33 U.S.C. § 1311(a).

III.

For these reasons, we vacate the district court's decision and remand the case for further proceedings consistent with this opinion.

VACATED AND REMANDED

---

[13] We also note that federal courts in several states, including some within this Circuit, have upheld in citizen suits the CWA's coverage of ground water-related discharges within those jurisdictions. *See, e.g.*, *Sierra Club v. Va. Elec. & Power Co.*, 247 F. Supp. 3d 753, 762 (E.D. Va. 2017); *Ohio Valley Envtl. Coal. Inc. v. Pocahontas Land Corp.*, 2015 WL 2144905, at *8 (S.D.W. Va. May 7, 2015); *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428, 445 (M.D.N.C. 2015); *see also Tenn. Riverkeeper v. Hensley-Graves Holdings, LLC*, No. 2:13-CV-877-LSC, at 13-18 (N.D. Ala. Aug. 20, 2013).

FLOYD, Circuit Judge, dissenting:

Based on allegations that pollutants are being added into navigable waters, the majority concludes that the Appellants have adequately alleged a cognizable and ongoing Clean Water Act ("CWA") violation. Maj. Op. at 19. While this conclusion may seem intuitive at first glance, close examination of the text, history, and structure of the CWA reveals that not every addition of pollution amounts to a CWA violation—much less an ongoing CWA violation. Congress precisely defined a CWA violation as the addition of pollutants *from a point source*, and for there to be an ongoing CWA violation, there must be an ongoing addition of pollutants from a point source into navigable waters. *See* 33 U.S.C. § 1362(12). Here, the only point source at issue—Kinder Morgan's pipeline—has been repaired and is not currently adding any pollutants into navigable waters, thus negating a necessary element of a CWA violation. Because there is no ongoing violation under the meaning of the CWA, I would affirm the district court's dismissal of the complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. I respectfully dissent.

I.

A.

The parties' pleadings and briefs reveal the following facts. In late 2014, residents of Belton, South Carolina, discovered that Kinder Morgan's pipeline released a large amount of gasoline and contaminated the nearby ground ("spill site"). Kinder Morgan repaired the pipeline within a few days of discovering

the leak and began remediation efforts that are ongoing to this day under the supervision of the South Carolina Department of Health and Environmental Control (DHEC). Kinder Morgan has recovered over 209,000 gallons of gasoline, but over 160,000 gallons of gasoline remain unrecovered at the spill site. Kinder Morgan's repaired pipeline is not currently leaking any additional gasoline. Nevertheless, as the gasoline from the spill site gets washed off by ground water or seeps through the ground from the spill site, gasoline is being introduced to navigable waters. In December 2016, the environmental groups Upstate Forever and Savannah Riverkeeper (collectively, "Appellants") initiated a citizen suit against Kinder Morgan, alleging an ongoing CWA violation. After full briefing on the matter, on April 20, 2017, the district court dismissed the Appellants' complaint for lack of subject matter jurisdiction and failure to state a claim.

B.

We review a district court's order dismissing a complaint for lack of subject matter jurisdiction and for failure to state a claim *de novo*. *Goldfarb v. Mayor & City Council of Balt.*, 791 F.3d 500, 505 (4th Cir. 2015). Rule 12(b)(1) of the Federal Rules of Civil Procedure allows a party to move to dismiss a plaintiff's complaint for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). To determine whether subject matter jurisdiction exists, courts are "to regard the pleadings' allegations as mere evidence . . . and may consider evidence outside of the pleadings without converting the proceeding to one for summary judgment." *Richmond, Fredericksburg & Potomac R. Co. v. United States*, 945 F.2d 765, 768

(4th Cir. 1991). The nonmoving plaintiff bears the burden of proving subject matter jurisdiction, and "the moving party should prevail only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Id.*

Rule 12(b)(6) allows a party to move to dismiss the plaintiff's complaint for failure to state a claim. Fed. R. Civ. P. 12(b)(6). When a complaint is attacked by a Rule 12(b)(6) motion, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions . . . ." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation marks omitted). "Factual allegations must be enough to raise a right to relief above the speculative level." *Id.*

II.

Congress enacted the CWA, 33 U.S.C. § 1251 *et seq.*, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251. To accomplish these goals, Congress comprehensively reshaped the federal water regulatory scheme in various ways. *See EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 203-4 (1976).

First, Congress concentrated the federal regulatory effort on curtailing point source pollution—that is, pollution from "discernible, confined and discrete conveyance[s]," 33 U.S.C. § 1362(14)—"which tended to be more notorious and more easily targeted," *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 550 F.3d 778, 780 (9th Cir. 2008). Second, Congress established the National Pollution Discharge Elimination System (NPDES) which "requires dischargers to obtain

permits that place limits on the type and quantity of pollutants that can be released into the Nation's waters." *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004). Third, Congress sought to ensure compliance by instituting an enforcement mechanism under which state and federal governments bear the primary responsibility for policing past and ongoing CWA violations, and private citizens provide supplementary enforcement for ongoing violations. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 52-53, 58 (1987); *The Piney Run Preservation Ass'n v. The Cty. Comm'rs of Carroll Cty., Md.*, 523 F.3d 453, 456 (4th Cir. 2008).

While the CWA includes other important features, it bears explaining these three central features in detail, as they are critical to this appeal.

A.

In drafting the CWA, Congress focused the federal regulatory effort on reducing point source pollution by making the existence of, and the addition of pollutants from, a point source a *sine qua non* element of a CWA violation. The text and structure of the CWA unambiguously lead to this conclusion.

At the outset, it is important to note that "Congress consciously distinguished between point source and nonpoint source discharges." *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976). Point source pollution is pollution from "any discernible, confined and discrete conveyance." 33 U.S.C. § 1362(14). The non-exhaustive list of examples of a point source in the CWA includes "pipe, ditch, channel, tunnel, conduit, well, discrete fissure,

container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft." *Id.* All other sources of pollution—namely, those that are not "discernible, confined and discrete," *id.*—are considered nonpoint sources. *Or. Nat. Desert Ass'n*, 550 F.3d at 780. In other words, nonpoint source pollution "is defined by exclusion and includes all water quality problems" that are not from a point source. *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 166 (D.C. Cir. 1982).

Unlike point source pollution, nonpoint source pollution "arises from many dispersed activities over large areas, and is not traceable to any single discrete source." *League of Wilderness Defs./Blue Mts. Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1183 (9th Cir. 2002). "Congress had classified nonpoint source pollution as runoff caused primarily by rainfall around activities that employ or create pollutants." *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 220 (2d Cir. 2009) (internal quotation marks omitted). Indeed, a common example of nonpoint source pollution is rain washing pollution off the highway and carrying it along "by runoff in a polluted soup[] [to] creeks, rivers, bays, and the ocean." *Forsgren*, 309 F.3d at 1183. The EPA guidance on nonpoint source pollution similarly confirms that "[i]n practical terms, nonpoint source pollution does not result from a discharge at a specific, single location (such as a single pipe) but generally results from land runoff, precipitation, atmospheric deposition, or percolation." *Cordiano*, 575 F.3d at 220 (quoting EPA Office of Water, *Nonpoint Source Guidance* 3 (1987)).

That Congress intended to target point source pollution, rather than nonpoint source pollution, is evident from the text of the CWA, which makes the existence of a point source a required element of a CWA violation. 33 U.S.C. § 1311(a) provides that "[e]xcept as in compliance with [the various section in the CWA], the discharge of any pollutant by any person shall be unlawful." "Discharge of a pollutant" is a term of art under the CWA, with a more precise meaning than under ordinary parlance. *Cf. Burgess v. United States*, 553 U.S. 124, 129 (2008) ("Statutory definitions control the meaning of statutory words . . . in the usual case." (internal quotation marks omitted)). Congress defined "discharge of a pollutant" as "any addition of any pollutant to navigable waters *from any point source*." 33 U.S.C. § 1362(12) (emphasis added).

In summarizing the requirements under these two statutory provisions, 33 U.S.C. §§ 1311(a), 1362(12), courts have consistently restated the elements of a CWA violation as "(1) discharg[ing] (2) a pollutant (3) into navigable waters (4) *from a point source* (5) without a [NPDES] permit." *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1142 (10th Cir. 2005) (emphasis added); *see also Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1008 (11th Cir. 2004); *Comm. To Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 309 (9th Cir. 1993); *Nat'l Wildlife Fed'n v. Consumer Power Co.*, 862 F.2d 580, 583 (6th Cir. 1988) ("[F]or NPDES requirements to apply to any given set of circumstances, 'five elements must be present: (1) a *pollutant* must be (2) *added* (3) *to navigable waters* (4) *from* (5) a *point source*.'" (quoting *Gorsuch*, 693 F.2d at 165)); *Avoyelles*

Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 922 (5th Cir. 1983). The "point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters[.] . . .' " *Miccosukee Tribe*, 541 U.S. at 105. For there to be a conveyance or "addition" of pollutants under the meaning of the CWA, "a 'point source must *introduce* the pollutant into navigable water from the outside world[,]' . . . [that is,] any place outside the particular body of water to which pollutants are introduced." *Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491 (2d Cir. 2001) (quoting *Gorsuch*, 693 F.2d at 165). As these definitions unambiguously show, a critical element of a CWA violation is that the pollutant comes from a point source.

Furthermore, the general structure of the CWA confirms that Congress sought to focus on point source pollution. "A central provision of the [CWA] is its requirement that individuals, corporations, and governments secure [NPDES] permits before discharging pollution from any point source into the navigable waters . . ." *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 602 (2013). Under the CWA, point source pollution is regulated by the EPA through the NPDES permitting program, *see* 33 U.S.C. § 1342, and nonpoint source pollution is regulated by the states, *see* 33 U.S.C. § 1329; *Cordiano*, 575 F.3d at 219-220; *Gorsuch*, 693 F.2d at 165-66. Based on this structure, courts have consistently recognized that "nonpoint sources of pollution have not generally been targeted by the CWA . . . ." *Or. Nat. Desert Ass'n*, 550 F.3d at 785. In drafting the CWA, "[w]hile Congress could have defined a 'discharge' to include generalized

runoff, . . . it chose to limit the permit program's application to the . . . [point source] category." *Id.* (quoting William L. Andreen, *Water Quality Today—Has the Clean Water Act Been A Success?*, 55 Ala. L. Rev. 537, 562 (2004)). In sum, the fact that "the [CWA] assigns the primary responsibility for regulating point sources to the EPA and nonpoint sources to the states," *Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 299 (3d Cir. 2015), plainly shows that Congress's main focus in enacting the CWA was the reduction of point source pollution.

A careful review of the CWA's text and structure reveals that Congress sought to target point source pollution and thus included point source as an indispensable element of a CWA violation.[1]

---

[1] While the text and structure speak unambiguously, for those who may find legislative history persuasive, the CWA's legislative history similarly confirms Congress's focus on point source pollution. Congress added the term "point source" "as a means of identifying industrial polluters" to narrow and clarify the scope of the CWA. *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 647 (2d Cir. 1993). The Senate Report for the CWA explains:

> In order to further clarify the scope of the regulatory procedures in the Act [sic] the Committee has added a definition of point source to distinguish between control requirements where there are specific confined conveyances, such as pipes, and control requirements which are imposed to control runoff. The control of pollutants from runoff is applied pursuant to Section 209 and the authority resides in the State or local agency.

S. Rep. No. 92-414 (1972), *as reprinted in* 1972 U.S.C.C.A.N. 3668, 3744. The narrowing of Congress's regulatory focus resulted "in part because nonpoint sources were far more

B.

Congress chose the NPDES permitting program as a central means of controlling point source pollution. "[I]ndividuals, corporations, and governments [must] secure [NPDES] permit[s] before discharging pollution from any point source into the navigable waters of the United States." *Decker*, 568 U.S. at 602.

Under the CWA, the state and federal governments act as partners in administering the NPDES program and issuing the permits. *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). An NPDES permit can be issued by either the EPA or a state agency. The EPA "initially administers the NPDES permitting system for each State, but a State may apply for a transfer of permitting authority to state officials." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 650 (2007). "If authority is transferred, then state officials—not the federal EPA—have the primary responsibility for reviewing and approving NPDES discharge permits, albeit with continuing EPA oversight." *Id.*

An NPDES permit "place[s] limits on the type and quantity of pollutants that can be released into the Nation's waters," *Miccosukee Tribe*, 541 U.S. at 102, and "defines, and facilitates compliance with, and

---

numerous and more technologically difficult to regulate," whereas "point sources . . . tended to be more notorious and more easily targeted." *Or. Nat. Def. Ass'n*, 550 F.3d at 780; *see also* S. Rep. No. 92-414, at 39 ("[M]any nonpoint sources of pollution are beyond present technology of control"). Whatever the reason, the legislative history confirms that Congress intended to focus on point source pollution in enacting the CWA.

enforcement of, . . . a discharger's obligations under the [CWA]," *California ex rel. State Water Res. Control Bd.*, 426 U.S. at 205. The EPA promulgates the "effluent limitations" that "restrict the quantities, rates, and concentrations of specified substances which are discharged." *Arkansas*, 503 U.S. at 101; *see also* 33 U.S.C. §§ 1311, 1314. The states, with substantial guidance from EPA, promulgate the "water quality standards" that express the states' "desired condition of a waterway . . . so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." *Id.* (internal quotation marks); *see also* 33 U.S.C. § 1313. In addition to listing the effluent limitations and water quality standards, NPDES permits also require "compliance with the inspection, reporting and monitoring requirements of the [CWA] as outlined in 33 U.S.C. § 1318." *Menzel v. Cty. Util. Corp.*, 712 F.2d 91, 94 (4th Cir. 1983). To the benefit of NPDES permit holders, the CWA "shields NPDES permit holders from liability if their discharges comply with their permits." *Ohio Valley Envtl. Coal. v. Fola Coal Co., LLC*, 845 F.3d 133, 135 (4th Cir. 2017). The NPDES permitting scheme thus constitutes "[t]he primary means for enforcing these limitations and standards." *Arkansas*, 503 U.S. at 101.

NPDES permitting is, however, not only ill-equipped to address, but also inapplicable to, nonpoint source pollution. Unlike a point source, nonpoint source pollution "arises from many dispersed activities over large areas, and is not traceable to any single discrete source." *Forsgren*, 309 F.3d at 1184. And for that reason, nonpoint source pollution "is very

difficult to regulate through individual permits." *Id.* More specifically, it would be difficult to mandate compliance with inspection, reporting, and monitoring requirements given that nonpoint source pollution cannot be traced to discrete sources. Thus, sensibly, the CWA does not attempt to regulate nonpoint source pollution through the NPDES permitting. *See El Paso*, 421 F.3d at 1140 n.4 (observing that "[g]roundwater seepage that travels through fractured rock would be nonpoint source pollution, which is not subject to NPDES permitting"); *Forsgren*, 309 F.3d at 1183 (stating that nonpoint source pollution "is regulated in a different way and does not require [an NPDES] permit); *Gorsuch*, 693 F.2d at 166 (accepting the EPA's explanation of the CWA that nonpoint source pollution "includes all water quality problems not subject to § 402 [NPDES permit program]").

In sum, Congress chose the NPDES permitting scheme as the primary means of controlling point source pollution, which is the focus of the CWA regulatory scheme.

C.

Congress also instituted a comprehensive enforcement scheme to ensure compliance with the CWA, in which the state and federal governments bear the primary responsibility for enforcement, but private citizens have limited supplementary enforcement authority.

Under the CWA, "the primary responsibility for enforcement rests with the state and federal governments . . . ." *The Piney Run*, 523 F.3d at 456 (quoting *Sierra Club v. Hamilton Cty. Bd. of Cty. Comm'rs*, 504 F.3d 634, 637 (6th Cir. 2007)). 33 U.S.C.

§ 1319 vests the EPA with a broad range of enforcement tools—criminal, civil, and administrative. *See, e.g.*, *Sackett v. EPA*, 566 U.S. 120, 122 (2012) ("If the EPA determines that any person is in violation of [the CWA], the Act directs the agency either to issue a compliance order or to initiate a civil enforcement action."); *United States v. Schallom*, 998 F.2d 196, 198 (4th Cir. 1993) (per curiam) (affirming a criminal conviction for discharging pollutants without a permit in violation of 33 U.S.C. § 1319(c)(2)). The EPA may initiate administrative and civil proceedings for both present and past CWA violations. *See Gwaltney*, 484 U.S. at 58.

The CWA also includes a citizen suit provision, 33 U.S.C. § 1365(a), under which "private citizens provide a second level of enforcement and can serve as a check to ensure the state and federal governments are diligent in prosecuting [CWA] violations." *The Piney Run*, 523 F.3d at 456 (quoting *Hamilton Cty. Bd. of Cty. Comm'rs*, 504 F.3d at 637). Under the citizen suit provision, "any citizen may commence a civil action . . . against any person . . . who is alleged to be in violation of" the CWA. 33 U.S.C. § 1365(a)(1). However, "the citizen suit is meant to supplement rather than to supplant governmental action," *Gwaltney*, 484 U.S. at 60, and, therefore, Congress limited a citizen's ability to enforce the CWA in various ways.[2]

---

[2] A citizen invoking the CWA citizen suit provision must first show that she has Article III and statutory standing to bring the suit. *See* 33 U.S.C. § 1365(g); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 152 (4th Cir. 2000) (en banc). Moreover, the citizen may not commence suit prior to 60

One important jurisdictional limit on a citizen's ability to enforce the CWA is that she may only bring a suit for an *ongoing* CWA violation but not for a *past* violation. *Id.* at 57. The text of the CWA authorizes a citizen suit only against someone "alleged to be in violation of" the CWA. 33 U.S.C. § 1365(a)(1). The Supreme Court concluded that "[t]he most natural reading of 'to be in violation' is a requirement that citizen-plaintiffs allege a state of either *continuous* or *intermittent* violation—that is, a reasonable likelihood that a past polluter will continue to pollute in the future." *Gwaltney*, 484 U.S. at 57 (emphasis added). The *Gwaltney* Court further stated that "Congress could have phrased its requirement in language that looked to the past ('to have violated'), but it did not choose this readily available option." *Id.* In other words, Congress did not authorize a citizen to enforce the CWA for "wholly past violations." *Id.*. The Supreme Court observed that allowing citizens to pursue wholly past violations "could undermine the supplementary role envisioned for the citizen suit." *Id.* at 60. Thus, a citizen seeking to commence a citizen suit "must show that the defendant's violations of the

---

days after giving notice of the alleged violation to the appropriate governmental authority and the alleged polluter. 33 U.S.C. § 1365(b)(1)(A). Lastly, 33 U.S.C. § 1365(b)(1)(B) "bars a citizen from suing if the EPA or the State has already commenced, and is 'diligently prosecuting,' an enforcement action." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 175 (2000). Congress instituted these restrictions on the CWA citizen suit provision "to strike a balance between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits." *Hallstrom v. Tillamook Cty.*, 493 U.S. 20, 29 (1989).

CWA are ongoing at the time of suit." *Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 521 (4th Cir. 2003).

Therefore, although Congress envisioned private citizens playing an important role in the CWA enforcement by providing supplementary enforcement, it also placed jurisdictional limitations on citizen suits by requiring the existence of an ongoing violation.

III.

The threshold jurisdictional question in this appeal is whether there is a cognizable and ongoing CWA violation such that the Appellants' citizen suit may proceed. *See Gwaltney*, 484 U.S. at 57. In my view, the Appellants have failed to show that the CWA violation is ongoing, because there is no ongoing discharge of pollutants from a point source. *Cf. Am. Canoe Ass'n*, 326 F.3d at 521. Instead, the facts presented to us in the record demonstrate that there is an ongoing groundwater migration from the spill site, which does not amount to a CWA violation and cannot support a citizen suit. *See Or. Nat. Desert Ass'n*, 550 F.3d at 785 (noting that Congress chose not to include generalized runoff within the definition of "discharge").

A.

In my view, there is no ongoing CWA violation. The Appellants cannot show that there is an ongoing discharge of pollutants from a point source, because the only point source at issue—the pipeline—is not currently leaking or releasing any pollutants.

A CWA violation is defined as an unpermitted "discharge of any pollutant by any person." 33 U.S.C. § 1311(a). "Discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). For there to be an "addition . . . from a point source," *id.*, the point source must convey, transport, or introduce the pollutant to navigable waters. *See Miccosukee Tribe*, 541 U.S. at 105 (observing that "a point source . . . need only convey the pollutant to 'navigable waters'" and that the examples of point sources in 33 U.S.C. § 1362(12) are objects that "transport" pollutants); *Catskill Mts.*, 273 F.3d at 491 ("[A] 'point source must *introduce* the pollutant into navigable water from the outside world.'" (quoting *Gorsuch*, 693 F.2d at 165)). In other words, to constitute a CWA violation, a point source must have been involved in the discharging activity.

Thus, for there to be an *ongoing* CWA violation, a point source must currently be involved in the discharging activity by adding, conveying, transporting, or introducing pollutants to navigable waters. *See El Paso Gold Mines*, 421 F.3d at 1140 (summarizing the "ongoing migration cases" in which there was "an identifiable discharge from a point source that *occurred in the past* . . . ," but "[a]t the time of suit, the discharging activity *from a point source* . . . had ceased," and citizen suits were dismissed). The majority notes that "[t]he CWA's language does not require that the point source continue to release a pollutant for a violation to be ongoing." Maj. Op. at 16. It is difficult to see how there could be an ongoing CWA violation—defined as "any addition of pollutants . . . from any point source"—without an ongoing discharging activity from a point

source. In my view, to constitute an ongoing CWA violation (i.e. ongoing point source pollution), the point source's discharging, adding, conveying, transporting, or introducing of pollutants must be continuous.

Kinder Morgan's pipeline is not presently leaking or releasing gasoline; therefore, the only relevant point source is not currently discharging—adding, conveying, transporting, or introducing—pollutants to navigable waters. *Cf. Miccosukee Tribe*, 541 U.S. at 105; *Catskill Mts.*, 273 F.3d at 491. Thus, in my view, there is no ongoing violation under the meaning of the CWA. This should therefore end the Appellants' citizen suit, which requires an ongoing CWA violation. *See* 33 U.S.C. §§ 1362(12); 1365(a); *Gwaltney*, 484 U.S. at 57. The majority also seemingly recognizes that pollutants must be actively "*originating* from a point source." Maj. Op. at 17 (emphasis added). However, the majority's theory is that since the pollutants in the spill site *once came* from the pipeline, the continuing addition from the spill site is thus a continuing discharge from a point source. But accepting this position would effectively erase the phrase *from any point source* out of the CWA, 33 U.S.C. § 1362(12), and find an ongoing CWA violation even though no pollutant is originating or being added from a point source any longer. Thus, in my view, the majority disregards point source as an element of a CWA violation and invents a violation not cognizable under the CWA.

Because the pipeline is not actively and continuously discharging pollutants, there is no ongoing violation, but only a wholly past violation, under the meaning of the CWA.

B.

In my view, this is an ongoing migration case, which does not amount to an ongoing CWA violation and cannot support a citizen suit. Kinder Morgan is a past violator—that is, it indirectly added pollutants to navigable waters from its point source when its pipeline leaked and released a large amount of gasoline that reached navigable waters. Although Kinder Morgan's pipeline itself is not currently leaking, the effects of Kinder Morgan's past violation continue. The spill site continues to introduce gasoline into navigable waters as gasoline migrates through the ground or as ground water washes off and carries gasoline to navigable waters. This Court has not addressed whether a past discharge with lasting effects—through an ongoing migration of pollutants through groundwater movement—can support a citizen suit. *See Ohio Valley Envtl. Coal., Inc. v. Hernshaw Partners, LLC*, 984 F. Supp. 2d 589, 597 (S.D. W. Va. 2013) (observing there is no Fourth Circuit precedent directly on point).

Given similar circumstances, however, several federal courts have concluded that ongoing migration of pollutants from a past discharge does not amount to an ongoing discharge necessary to support a citizen suit under the CWA. *Conn. Coastal Fishermen's Ass'n v. Remington Arms Co.*, 989 F.2d 1305, 1312-13 (2d Cir. 1993) (finding no ongoing CWA violation because the alleged polluter had "ceased operation of the Gun Club" that deposited lead shot and clay target debris into navigable waters "by the time plaintiff filed suit"); *Pawtuxet Cove Marina v. Ciba-Geigy Corp.*, 807 F.2d 1089, 1094 (1st Cir. 1986) (finding no ongoing CWA

violation because "[a]t the time plaintiffs brought suit, . . . defendant had ceased operating"); *Hamker v. Diamond Shamrock Chem. Co.*, 756 F.2d 392, 397 (5th Cir. 1985) (finding no ongoing CWA violation because "the complaint alleges . . . only that there are continuing *effects* from the past discharge, and such an allegation is insufficient for the purposes of section 1365."); *Aiello v. Town of Brookhaven*, 136 F. Supp. 2d 81, 120-21 (E.D.N.Y. 2001) (concluding that the ongoing migration of residual leachate plume from a past violation is not an ongoing CWA violation), *Wilson v. Amoco Corp.*, 33 F. Supp. 2d 969, 975-76 (D. Wyo. 1998); *Friends of Santa Fe Cty. v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1354 (D.N.M. 1995) ("Migration of residual contamination resulting from previous releases is not an ongoing discharge within the meaning of the Act."); *Brewer v. Ravan*, 680 F. Supp. 1176, 1183 (M.D. Tenn. 1988); *cf. El Paso*, 421 F.3d at 1140.

Like those courts, I would conclude that the lasting effects of Kinder Morgan's past violation cannot give rise to a citizen suit under the CWA for two reasons. First, ongoing migration does not involve a point source, thus negating an essential element of a CWA violation. Second, ongoing migration is, by definition, nonpoint source pollution, which is outside of the CWA's reach.

i.

Ongoing migration from a site contaminated by a past discharge does not involve a point source and is thus not a cognizable violation under the CWA. *See* 33 U.S.C. § 1362(12). Indeed, the lack of a discharging activity from a point source was the decisive factor for

many courts in concluding that ongoing migration cannot support a CWA citizen suit. As the Tenth Circuit has summarized:

> The ongoing migration cases [in which the courts dismissed the citizen suits] . . . all involve an identifiable discharge from a point source that *occurred in the past*, whether it be a spill, *Wilson*, 989 F. Supp. at 1163, the accidental leakage at a chemical plant, *Hamker*, 756 F.2d at 394, the discharge of lead shot and clay targets at a firing range, *Remington Arms*, 989 F.2d at 1309, or dumping of waste rock at a mine, *LAC Minerals*, 892 F. Supp. at 1337. At the time of suit, the discharging activity *from a point source* in all of these cases had ceased; all that remained was the migration, decomposition, or diffusion of the pollutants into a waterway.

El Paso, 421 F.3d at 1140. Likewise, at the time of the Appellants' suit, the discharging activity from Kinder Morgan's point source (i.e., the gasoline leak) had ceased, and all that remained was migration of gasoline from the spill site to navigable waters. "Migration of residual contamination resulting from previous releases is not an ongoing discharge within the meaning of the [CWA]," *LAC Minerals*, 892 F. Supp. at 1354, because the point source itself is not conveying or introducing a pollutant into navigable waters, *see Miccosukee Tribe*, 541 U.S. at 105; *Gorsuch*, 693 F.2d at 175.

The majority attempts to distinguish one of these migration cases from the Fifth Circuit, *Hamker*, 756 F.2d at 397, by observing that *Hamker* only dealt with

an alleged discharge into groundwater and not navigable waters. *See* Maj. Op. at 19. But the court's analysis in *Hamker* did not turn on the issue of navigable waters; rather, it turned on the fact that the continuing addition of pollutants did not come from any point source. *Hamker*, 756 F.2d at 397. The majority further states in a footnote that "to the extent that *Hamker*'s reasoning suggests that an ongoing violation requires that the point source continually discharge a pollutant, *Hamker* contravenes our decision in *Goldfarb*." Maj. Op. at 19 n.9. The majority misplaces reliance on *Goldfarb*. This Court in *Goldfarb* observed that, under the Resource Conservation and Recovery Act's (RCRA) citizen suit provision, 42 U.S.C. § 6972(a)(1)(A), "although a defendant's *conduct* that is causing a *violation* may have ceased in the past . . . what is relevant is that the *violation* is continuous or ongoing." *Goldfarb*, 791 F.3d at 513. The statement in *Goldfarb* presumes that there already is an ongoing violation, does not help us in determining whether a polluter's past action with lasting effects should be viewed as past or ongoing violation, and is inapplicable to Kinder Morgan's situation because Kinder Morgan's CWA violation had ceased when its point source ceased discharging pollutants.

ii.

Moreover, migration of pollutants from the spill site amounts to an ongoing nonpoint source pollution. As discussed above, Congress chose not to regulate nonpoint source pollution through the NPDES permitting program. *See, e.g.*, *El Paso*, 421 F.3d at 1140 n.4; *Forsgren*, 309 F.3d at 1183; *Gorsuch*, 693

F.2d at 166; *Appalachian Power*, 545 F.2d at 1373-74. Nonpoint source pollution is commonly caused by the natural movements of rainfall or groundwater that wash off and carry pollutants from a large, diffuse area to navigable waters. *Codiano*, 575 F.3d at 220 ("[N]onpoint source pollution . . . generally results from land runoff, precipitation, atmospheric deposition, or percolation."); *El Paso*, 421 F.3d at 1140 n.4 ("Groundwater seepage that travels through fractured rock would be nonpoint source pollution, which is not subject to NPDES permitting."); *Sierra Club v. Abston Constr. Co., Inc.*, 620 F.2d 41, 44 (5th Cir. 1980) ("The focus of [the CWA] is on the 'discernible, confined and discrete' conveyance of the pollutant, which would exclude natural rainfall drainage over a broad area."); *Tr. for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984) ("Congress had classified nonpoint source pollution as runoff caused primarily by rainfall around activities that employ or create pollutants."). Nonpoint source pollution—caused by movements of rain or groundwater—"is very difficult to regulate through individual [NPDES] permits" because it "arises from many dispersed activities over large areas, and is not traceable to any single discrete source." *Forsgren*, 309 F.3d at 1184.

Here, the Appellants have alleged ongoing migration from the spill site, which does not amount to a CWA violation. The Appellants have alleged that the groundwater flow from the spill site is introducing pollutants to navigable waters. Appendix ("App.") 8. Indeed, the Appellants' CWA case is built on the novel theory that the introduction of pollutants through the movement of hydrologically connected *groundwater* amounted to a CWA violation. Appellant Br. 26. As the

record plainly shows, groundwater is carrying gasoline from the spill site, which spans in three different directions from the pipeline and covers a vast area. App. 99, 173. This kind of migration of pollutants through the natural movements of groundwater amounts to nonpoint source pollution. *El Paso*, 421 F.3d at 1140 n.4; *see also Forsgren*, 309 F.3d at 1184. While there is no doubt this kind of nonpoint source pollution affects the quality navigable waters, Congress deliberately chose not to place nonpoint source pollution within the CWA's reach.[3] *See, e.g.*, *Abston Constr.*, 620 F.2d at 44. In my view, therefore, because ongoing migration of pollutants is nonpoint source pollution, it is not cognizable under the CWA.

In sum, I would conclude that ongoing migration of pollutants from a past discharge does not amount to an ongoing CWA violation.

---

[3] An exception to this general rule is that the "[g]ravity flow, resulting in a discharge into a navigable body of water, may be part of a point source discharge if the [polluter] at least initially collected or channeled the water and other materials." *Abston Contr.*, 620 F.2d at 45. This is because, once a polluter attempts to channel, collect, or otherwise redirect the flow of water, such an effort becomes a "discernible, confined and discrete" conveyance. 33 U.S.C. § 1362(14); *see also Sierra Club v. Va. Elec. Power Co.*, 247 F. Supp. 3d 753, 763 (E.D. Va. 2017) ("Dominion built the piles and ponds to concentrate [pollutants] in one location . . . [which] channels and conveys [pollutants] directly into groundwater and thence into the surface waters. Essentially they are discrete mechanisms . . . . "). The Appellants have not alleged that Kinder Morgan has at all attempted to channel, collect, or redirect the free flow of groundwater. *See* App. 419.

C.

I do not take lightly the allegations of the severe environmental harm caused by Kinder Morgan. The Appellants have alleged facts suggesting a serious environmental disaster that cannot be easily overlooked as a mere peccadillo on the part of Kinder Morgan's operation and management. The allegations indicate that a full restoration will take many years and require tremendous resources.

The severity of the situation alone, however, does not and cannot give rise to a citizen suit under the CWA. "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). In creating a citizen suit provision under the CWA, Congress deliberately limited federal courts' jurisdiction such that they may entertain citizen suits only for allegations of ongoing CWA violations. 33 U.S.C. § 1365(a); *Gwaltney*, 484 U.S. at 57. And Congress precisely defined a CWA violation as a point source discharge without an NPDES permit. The critical element—the addition from a point source—cannot be satisfied here because Kinder Morgan has repaired its pipeline and the pipeline is not currently leaking or adding pollutants to navigable waters. The Appellants can only point to nonpoint pollution from the spill site or the past violation, which cannot give rise to a citizen suit under the CWA.

Barring the Appellants' citizen suit would not necessarily mean that Kinder Morgan will evade accountability. Under the CWA, the primary responsibility for enforcement rests with the state and

federal governments. *The Piney Run*, 523 F.3d at 456. In fact, the State of South Carolina, through DHEC, has stepped in and is actively overseeing the remediation efforts. DHEC has directed Kinder Morgan to investigate the impact of the spill and implement corrective action plans. After a series of back and forth revisions between DHEC and Kinder Morgan, on March 1, 2017, DHEC approved the "Startup Plan for Surface Water Protection Measures" that was meant to implement additional remedial measures in the spill site. App. 351. Thus, even without a CWA citizen suit, the State of South Carolina is protecting and remediating the waters and natural resources within its borders. In addition to ordering Kinder Morgan to remediate the spill site, the state and federal governments are also empowered to use criminal, civil, and administrative enforcement actions for even for *past* violations of the CWA.

Moreover, if a CWA citizen suit fails for lack of subject matter jurisdiction, other state and federal laws may provide actionable claims against Kinder Morgan. South Carolina state law may provide a more encompassing response. As the *amici* States have pointed out, Brief of the *Amici* States 22-23, South Carolina law provides for the state to recover monetarily from polluters for violations that includes even nonpoint source pollution, *see* S.C. Code § 48-1-90(a)(1). In addition to the enforcement mechanism under state law, other federal laws could provide recourse. In response to Kinder Morgan's past spill, a federal citizen suit may perhaps be more appropriate under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.*, which is "designed to effectuate the cleanup of

toxic waste sites" and to impose cleanup costs, *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483 (1996) (citations omitted), or under the RCRA, 42 U.S.C. § 6901 *et seq.*, which concerns with the disposal of hazardous waste, *Aiello*, 136 F. Supp. 2d at 121 ("It is RCRA, rather than the CWA, that appropriately addresses liability for ongoing contamination by past polluters.").

The Appellants have raised serious allegations but, in my view, the CWA citizen suit is not the proper mechanism to seek redress. Therefore, the district court lacked subject matter jurisdiction and the complaint failed to state a claim upon which relief can be granted.

IV.

For the reasons above, I would affirm the district court's dismissal of the Appellants' complaint. I respectfully dissent.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-1640

UPSTATE FOREVER; SAVANNAH RIVERKEEPER,

Plaintiffs-Appellants,

v.

KINDER MORGAN ENERGY PARTNERS, L.P.;
PLANTATION PIPE LINE COMPANY, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the District of South Carolina,
No. 8:16-cv-04003-HMH

Filed: May 30, 2018

ORDER

Upon consideration of appellees' petition for rehearing and rehearing en banc and appellants' response, Chief Judge Gregory and Judge Keenan voted to deny panel rehearing, and Judge Floyd voted to grant panel rehearing.

A requested poll of the court failed to produce a majority of judges in regular active service and not disqualified who voted in favor of rehearing en banc.

Chief Judge Gregory, Judge Wilkinson, Judge King, Judge Duncan, Judge Keenan, Judge Wynn and Judge Diaz voted to deny rehearing en banc. Judge Niemeyer, Judge Traxler, Judge Agee, Judge Floyd, and Judge Thacker voted to grant rehearing en banc. Judge Motz and Judge Harris did not participate in the poll.

The petition for rehearing and rehearing en banc is denied.

Entered at the direction of Judge Keenan.

For the Court

/s/ Patricia S. Connor, Clerk

Appendix C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

No. 8:16-cv-04003-HMH

UPSTATE FOREVER AND SAVANNAH RIVERKEEPER,

Plaintiffs,

v.

KINDER MORGAN ENERGY PARTNERS, L.P. AND PLANTATION PIPE LINE COMPANY, INC.,

Defendants.

Filed: April 20, 2017

OPINION & ORDER

This matter is before the court on the Defendants' motion to dismiss the Plaintiffs' complaint. In their complaint, Plaintiffs Upstate Forever and Savannah Riverkeeper allege that Defendants Kinder Morgan Energy Partners, L.P. ("Kinder Morgan") and Plantation Pipe Line Company, Inc. ("PPL") have violated the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1376, through the unlawful discharge of gasoline, gasoline and petroleum substances, and other contaminants that have ultimately flowed into

the waters of the United States.[1] The Defendants have moved to dismiss for failure to state a claim for relief pursuant to Rule 12(b)(6) and for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Further, the Defendants argue that the Plaintiffs' claims for injunctive relief should be dismissed based on primary jurisdiction abstention and *Burford* abstention.[2] After review, the court grants the Defendants' motion to dismiss.

I. Factual and Procedural Background

This is an action arising out of a petroleum leak from PPL's pipeline on property owned by Eric and Scott Lewis, which is located in Anderson County, South Carolina near Belton, South Carolina (the "spill site"). (Compl. ¶ 1, ECF No. 1.); (Defs. Mem. Supp. Mot. Dismiss 1, ECF No. 14-1.) PPL owns the 3,100 mile pipeline that runs underground through the property. (*Id.* ¶¶ 3-4, ECF No. 1.) PPL is a subsidiary of Kinder Morgan. (*Id.* ¶ 4, ECF No. 1.) In December 2014, a leak caused by the failure of a patch over a dent was discovered on the pipeline on the property. (*Id.* ¶ 5, ECF No. 1.) The leak resulted in a discharge of an estimated 369,000 gallons of petroleum products. (Compl. ¶ 6, ECF No. 1.) The pipeline leak was repaired within a few days of discovering the leak and remediation efforts commenced. (Defs. Mem. Supp. Mot. Dismiss 3, ECF No. 14-1.)

---

[1] The Plaintiffs filed the instant case pursuant to the citizen suit provisions of the CWA set forth in 33 U.S.C. § 1365.

[2] *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

South Carolina Department of Health and Environmental Control ("SCDHEC") is involved in the oversight and enforcement of remediation efforts. (*Id.*, ECF No. 14-1.) To date, the Defendants have removed approximately 209,000 gallons of gasoline and petroleum products from the spill site. (Compl. ¶ 8, ECF No. 1.) However, it is undisputed that gasoline and petroleum products remain at the spill site and that remediation is ongoing. The Plaintiffs allege that the leak has resulted in the contamination of Browns Creek, Cupboard Creek, and two wetlands located in the vicinity of the spill. (*Id.* ¶ 11, ECF No. 1.)

The Defendants filed the instant motion to dismiss on February 17, 2017. (Mot. Dismiss, ECF No. 14.) The Plaintiffs responded in opposition on March 13, 2017. (Mem. Opp'n Mot. Dismiss, ECF No. 23.) The Defendants filed a reply on March 20, 2017. (Reply, ECF No. 24.) In addition, on March 7, 2017, the American Petroleum Institute ("API") and the Association of Oil Pipe Lines ("AOPL") filed a motion for leave to file amici curiae brief in support of Defendants' motion to dismiss. (Mot. Leave File Amici Curiae, ECF No. 17.) The Plaintiffs responded in opposition to the motion for leave to file amici curiae brief on March 21, 2017. (Pls. Mem. Opp'n Mot. Leave, ECF No. 25.) AOPL filed a reply on March 27, 2017. (Reply, ECF No. 26.) The court granted API and AOPL's motion for leave on March 29, 2017. This matter is now ripe for consideration.

II. Discussion of the Law

A. Motion to Dismiss Standard

When presented with a Rule 12(b)(6) motion to dismiss, the court must restrict its inquiry to the

sufficiency of the complaint rather than "resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Republican Party of N.C. v. Markley*, 980 F.2d 943, 952 (4th Cir. 1992). In order to survive a Rule 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

B. Rule 12(b)(1) Standard

In addition, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, a party may move to dismiss a cause of action based on lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Challenges to jurisdiction under Rule 12(b)(1) can be raised in two different ways: facial attacks and factual attacks. *Thigpen v. United States*, 800 F.2d 393, 401 n.15 (4th Cir. 1986) (citing *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982)), *disagreed with on other grounds*, *Sheridan v. United States*, 487 U.S. 392 (1988). A facial attack questions the sufficiency of the complaint. *Id.* In this context, the court must accept the allegations in the complaint "as true, and materials outside the pleadings are not considered." *Id.* Alternatively, a factual attack challenges the factual allegations in the complaint upon which subject-matter jurisdiction is based. *Id.* In this situation, the court is required to consider evidence

outside the pleadings as well, without converting the motion to a motion for summary judgment. *Id.*; *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991). To prevent dismissal, "the nonmoving party must set forth specific facts beyond the pleadings to show that a genuine issue of material fact exists." *Richmond, Fredericksburg & Potomac R.R. Co.*, 945 F.2d at 768. Thus, a dismissal should only be granted when "the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Id.*

C. CWA

To establish a CWA violation, plaintiffs must show the discharge of a pollutant into navigable waters from any point source "except as authorized by a permit issued under the National Pollution Discharge Elimination System (NPDES) program." *Assateague Coastkeeper v. Alan & Kristin Hudson Farm*, 727 F. Supp. 2d 433, 435 (D. Md. 2010); 33 U.S.C. §§ 1311(a), 1342, 1362(12); *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1142 (10th Cir. 2005) ("To establish a violation of these sections, a plaintiff must prove that the defendant (1) discharged (2) a pollutant (3) into navigable waters (4) from a point source (5) without a permit."). The Defendants raise a number of arguments in support of their position that this case must be dismissed for lack of jurisdiction and failure to state a claim because the discharge of petroleum products from the pipeline is not ongoing and was not a discharge of pollutants into navigable waters from a point source.

1. Point Source

The Plaintiffs allege that the Defendants have violated the CWA by discharging pollution from a point source into navigable waters without a permit. (Compl. ¶ 64-66, ECF No. 1.) The Defendants contend that there was no requirement to possess a NPDES permit because there was and is no point source discharge of any pollutants into navigable waters. (Defs. Mem. Supp. Mot. Dismiss 11-14, ECF No. 14-1.)

> Congress passed the Clean Water Act in 1972 to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. A central provision of the Act is its requirement that individuals, corporations, and governments secure National Pollutant Discharge Elimination System (NPDES) permits before discharging pollution from any point source into the navigable waters of the United States.

Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1331 (2013) (internal citations and quotation marks omitted). Pursuant to the CWA, "point source" means "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). "Discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source." § 1362(12). Under the CWA, navigable waters is "a defined term, and the definition is simply 'the waters of the United States.'" *Rapanos v. United States*, 547

U.S. 715, 730-31 (2006) (quoting 33 U.S.C. § 1362(7)). The Plaintiffs must allege more than merely identify a possible point source. The CWA requires that the Plaintiffs also allege that the point source actually added petroleum to navigable waters. *See, e.g.*, *Sierra Club v. BNSF Ry. Co.*, No. C13-967-JCC, 2016 WL 6217108, at *7 (W.D. Wash. Oct. 25, 2016) ("Based on the statutory language, Plaintiffs must do more than point to a statutorily defined point source to prove that there was actual addition of [petroleum] to the waters. They must also prove that there was a discharge to navigable waters.")

> Nonpoint source pollution is generally excluded from CWA regulations and is left to the states to regulate through their own tracking and targeting methods. The reason for this is, in part, because nationwide uniformity in controlling non-point source pollution [is] virtually impossible and, in part, because Congress is reluctant to allow extensive federal intrusion into areas of regulation that might implicate land and water uses in individual states.

Id. at *8 (internal citations and quotation marks omitted).[3] The CWA does not authorize a citizen suit for nonpoint source discharges. *See, e.g.*, *Chesapeake Bay Found., Inc. v. Severstal Sparrows Point, LLC*, 794 F. Supp. 2d 602, 620 (D. Md. 2011) ("There is no basis for a citizen suit for nonpoint source discharges

[3] The CWA requires that the states implement a program for "controlling pollution added from nonpoint sources to the navigable waters within the State and improving the quality of such waters." 33 U.S.C. § 1329(b)(1).

under the CWA."); *see also Or. Nat. Res. Council v. U.S. Forest Serv.*, 834 F.2d 842, 849 (9th Cir. 1987) ("[W]e do not believe that the Act allows for the enforcement of state water quality standards, as affected by nonpoint sources, under the citizen suit provision.").

First, the Plaintiffs contend that "the pipeline is a point source because pollution released from it continues to make its way to waters of the United States." (Pls. Mem. Opp'n Mot. Dismiss 12, ECF No. 23.); (Compl. ¶ 62, ECF No. 1.) The Plaintiffs do not allege that the pipeline is presently leaking. It is undisputed that the underground pipeline leaked petroleum into the ground which has in turn led to contamination of the soil and groundwater. However, the Plaintiffs must allege more than stating that pollutants ultimately may reach navigable waters.

The Plaintiffs are correct that a pipeline can be a point source. However, this is insufficient to state a claim for a CWA claim. The Plaintiffs must allege that the point source added pollutants to navigable waters. The Plaintiffs allege that "the area soaked with and contaminated by Defendants' leaked gasoline and petroleum products . . . and the seeps, flows, fissures, and channels are point sources that continue to discharge pollution into surface water and wetlands in violation of the Clean Water Act." (*Id.* ¶¶ 54-56, 62, ECF No. 1.) The Plaintiffs allege that the petroleum leaked into the groundwater and "[t]he groundwater contamination plume and the petroleum products have moved toward both streams and wetlands since the spill was first discovered, and they continue to move to the streams and wetlands." (*Id.* ¶ 16, ECF No.

1.) Further, the Plaintiffs allege that "[t]he gasoline that remains in the area of the spill is breaking down into the hazardous compounds that comprise gasoline—including benzene, toluene, ethylbenzene, xylenes, methyl tert-butyl ether ("MTBE"), naphthalene, and other contaminants—and making its way into groundwater supplies, wetlands, and surface waters in Anderson County and the Savannah River watershed." (*Id.* ¶ 10, ECF No. 1.)

It is undisputed that the leak from the underground pipeline discharge has contaminated the soil and groundwater at the spill site. However, in the case at bar, there is no continuing discharge from the pipeline and the Plaintiffs have failed to allege any facts to support the position that the pipeline discharged petroleum directly into navigable waters. *Hamker v. Diamond Shamrock Chem. Co.*, 756 F.2d 392, 397 (5th Cir. 1985) ("No continuing addition to the ground water from a point source is alleged, nor could it be alleged under the facts set forth in this complaint. Rather, the complaint alleges, necessarily, only that there are continuing *effects* from the past discharge, and such an allegation is insufficient for the purposes of section 1365."). The migration of pollutants through soil and groundwater is nonpoint source pollution that is not within the purview of the CWA. *See, e.g.*, *Tri-Realty Co. v. Ursinus Coll.*, Civil Action No. 11-5885, 2013 WL 6164092, at *8 (E.D. Pa. Nov. 21, 2013) (unpublished) ("Diffuse downgradient migration of pollutants on top of or through soil and groundwater . . . is nonpoint source pollution outside the purview of the CWA.").

In this case, the pipeline leaked petroleum into the ground and the contaminants are migrating through the soil and groundwater at the spill site. It is undisputed that the pipeline is no longer leaking. 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. All groundwater potentially flows downstream and will possibly at some point enter navigable waters. The Supreme Court in *Rapanos* found that the government's interpretation of the term "navigable waters" was overly broad and noted that "[t]he plain language of the [CWA] simply does not authorize [a] 'Land Is Waters' approach to federal jurisdiction." 547 U.S. at 734. The Plaintiffs' "Land is Waters" interpretation of the CWA is overly broad and untenable. *Id.* At best, with respect to the pipeline, the Plaintiffs have alleged a past discharge of pollutants into the soil and groundwater that may migrate into navigable waters, which is insufficient to state a plausible claim that the pipeline is a point source in this case or that the pipeline will discharge pollutants into navigable waters. Further, as set forth more fully below, the pollution that allegedly may reach navigable waters is nonpoint source pollution.

In addition, the Plaintiffs allege that the spill site and the seeps, flows, and fissures from the spill site are point sources. In other words, the Plaintiffs contend that the pollutants on top of the ground are a point source, *and* the pollutants in the ground are a point source. Specifically, the Plaintiffs allege that point sources "need not be the original source of the pollutant; it need only convey the pollutant to

navigable waters." *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004) (internal quotation marks omitted); (Pls. Mem. Opp'n Mot. Dismiss 23, ECF No. 23.). However, the conveyance must be "discernible, confined, and discrete." 33 U.S.C. § 1362(14). In *South Florida Water Management*, the Supreme Court cited examples of point sources in the CWA that did not generate pollution such as "ditches, tunnels, and conduits, objects that do not themselves generate pollutants but merely transport them," which are all discrete conveyances. *Id.*; *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45 (5th Cir. 1980) ("Gravity flow, resulting in a discharge into a navigable body of water, may be part of a point source discharge if the miner at least initially collected or channeled the water and other materials. A point source of pollution may also be present where miners design spoil piles from discarded overburden such that, during periods of precipitation, erosion of spill pile walls results in discharges into a navigable body of water by means of ditches, gullies and similar conveyances, even if the miners have done nothing beyond the mere collection of rock and other materials. The ultimate question is whether pollutants were discharged from 'discernable, confined, and discrete conveyance(s)' either by gravitational or nongravitational means.").

The facts of this case are distinguishable from the line of cases cited by the Plaintiffs involving "discernible, confined and discrete conveyance[s]" such as pits, holding ponds, cesspools, and coal plants. (Pls. Mem. Opp'n Mot. Dismiss 12, ECF No. 23 (citing *Consolidation Coal Co. v. Costle*, 604 F.2d 239, 249-50 (4th Cir. 1979)), *rev'd*, *EPA v. Nat'l Crushed Stone*

Ass'n, 449 U.S. 64 (1980)). In *Sierra Club v. Virginia Electric and Power Co.*, the district court found that coal ash piles were a point source because

> Dominion built the piles and ponds to concentrate coal ash, and its constituent pollutants, in one location. That one location channels and conveys arsenic directly into the groundwater and thence into the surface waters. Essentially, they are discrete mechanisms that convey pollutants from the old power plant to the river.

Civil Action No. 2:15-CV-112, 2017 WL 1095039, at *7 (E.D. Va. Mar. 23, 2017).

In the case at bar, there is no allegation that the Defendants have affirmatively undertaken any action to channel or direct contaminants to navigable waters and there is no discrete mechanism conveying the pollutants to navigable waters. To the contrary, the Defendants have undertaken efforts to remediate the spill site. The soil and ground water is contaminated and allegedly migrating toward navigable waters. As noted above, migration of pollutants through soil and groundwater is nonpoint source pollution. *See, e.g.*, *Chesapeake Bay Found.*, 794 F. Supp. 2d at 619-20 ("Discharge from migrations of groundwater or soil runoff is not point source pollution. . . ."); *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1140 n.4 (10th Cir. 2005) ("Groundwater seepage that travels through fractured rock would be nonpoint source pollution, which is not subject to NPDES permitting."); *Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1070 (9th Cir. 2011), *rev'd on other grounds sub nom.*, *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326

(2013) ("Stormwater that is not collected or channeled and then discharged, but rather runs off and dissipates in a natural and unimpeded manner, is not a discharge from a point source."); *Friends of Santa Fe Cnty. v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1359 (D.N.M. 1995) (finding that seepage of pollutants in soil to groundwater was not a point source).

Further, the Plaintiffs fail to cite any legal authority to support their argument that remediation efforts that are ongoing at the spill site are a point source. (Pls. Mem. Opp'n Mot. Dismiss 13, ECF No. 23.) The Defendants are not collecting or storing pollutants at the spill site in any discrete conveyance. The Defendants' placement of recovery wells and remediation efforts undertaken under the oversight of the SCDHEC is not a discernable, confined, or discrete conveyance of pollutants to navigable waters subject to NDPES permitting requirements.[4] Moreover, to find otherwise, would discourage remediation of contamination.

Based on the foregoing, the spill site and the seeps, flows, and fissures from the spill site are not point sources because there are no factual allegations of a "discernible, confined and discrete conveyance" of pollutants to navigable waters. § 1362(14). The Plaintiffs have identified a discrete source for the pollution, but have failed to allege a discrete conveyance of pollutants into navigable waters. *BNSF*

---

[4] Although SCDHEC has not commenced any civil or criminal action concerning the Defendants' spill, it has been and continues to be heavily involved in the oversight and approval of remediation efforts at the site. (Compl. ¶¶ 36, 37, ECF No. 1); (Pls. Mem. Opp'n Mot. Dismiss 4, ECF No. 23.)

Ry., 2016 WL 6217108, at *8 (finding that coal discharge to land and from land to water from passing trains were not point source discharges). Thus, the Defendants' motion to dismiss is granted with respect to Plaintiffs' claim that the Defendants violated the CWA by discharging pollutants into navigable waters without a NDPES permit.

2. Hydrological Connection

Second, the Plaintiffs allege that the Defendants have violated the CWA by discharging pollutants into groundwater that is hydrologically connected to surface waters. (Compl. ¶¶ 67- 70, ECF No. 1.) The Plaintiffs do not appear to dispute that the CWA does not apply to groundwater alone. *Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001) ("The law in [the Fifth Circuit] is clear that ground waters are not protected waters under the CWA."). The CWA defines "navigable waters" simply as "waters of the United States." 33 U.S.C. § 1362(7).

> Congress refers to "navigable waters" and "ground waters" as separate concepts, thus indicating that Congress considered them to be distinct. Second, the legislative history of the CWA indicates that Congress chose not to regulate groundwater, in part because "the jurisdiction regarding groundwaters is so complex and varied from State to State."

Chevron U.S.A., Inc. v. Apex Oil Co., 113 F. Supp. 3d 807, 816 (D. Md. 2015) (citing 33 U.S.C. §§ 1252(a), 1254(a)(5), and 1256(e)(1) (referring to "navigable waters and ground waters"); S. Rep. No. 92-414 (1972), *as reprinted in* 1972 U.S.C.C.A.N. 3668, 3739).

The Plaintiffs contend that jurisdiction exists in this case because the CWA applies to pollutants that have flowed into surface waters through hydrologically connected groundwater. District courts considering whether the CWA encompasses groundwater hydrologically connected to surface waters are split on this issue. *Wash. Wilderness Coal. v. Hecla Mining Co.*, 870 F. Supp. 983, 990 (D. Wash. 1994) (citations omitted) (noting courts are split on the issue of whether tributary groundwater that is naturally connected to surface water is subject to CWA).

However, the two circuit courts to address this issue have concluded that navigable waters does not include groundwater that is hydrologically connected to surface waters. In *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, the Seventh Circuit held that the CWA does not apply to groundwater that is hydrologically connected to surface waters. 24 F.3d 962, 965 (7th Cir. 1994) ("The possibility of a hydrological connection cannot be denied, but neither the statute nor the regulations makes such a possibility a sufficient ground of regulation." (internal citations omitted)). In addition, the Fifth Circuit in *Rice*, held that "a generalized assertion that covered surface waters will eventually be affected by remote, gradual, natural seepage from the contaminated groundwater is insufficient to establish liability under the [Oil Pollution Act]," which utilizes "textually identical definitions of 'navigable waters'" as the CWA. 250 F.3d at 268-70, 272 (holding that "ground waters are not protected waters under the CWA" and noting that "the existing case law interpreting the

CWA is a significant aid in our present task of interpreting the OPA").

The Fourth Circuit has not considered whether the CWA encompasses groundwater hydrologically connected to surface waters. Further, district courts within the Fourth Circuit are split on this issue. In *Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc.*, 25 F. Supp. 3d 798, 810 (E.D.N.C. 2014), the district court held that "Congress did not intend for the CWA to extend federal regulatory authority over groundwater, regardless of whether that groundwater is eventually or somehow 'hydrologically connected' to navigable surface waters." Further, in *Chevron*, the district court held "that Congress did not intend for groundwater to fall within the purview of 'navigable water,' even if it is hydrologically connected to a body of 'navigable water.'" 113 F. Supp. 3d at 817; *But see Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428, 445 (M.D.N.C. 2015) (disagreeing with Cape Fear and finding that CWA jurisdiction extends to pollution of groundwater hydrologically connected to surface water); *Ohio Valley Envtl. Coal. Inc. v. Pocahontas Land Corp.*, Civil Action No. 3:14-11333, 2015 WL 2144905, at *8 (S.D. W. Va. May 7, 2015) (unpublished); *Sierra Club v. Va. Elec. & Power Co.*, 145 F. Supp. 3d 601, 607 (E.D. Va. 2015); *Sierra Club v. Va. Elec. & Power Co.*, Civil Action No. 2:15-CV-112, 2017 WL 1095039, at *6 (E.D. Va. Mar. 23, 2017).[5]

[5] District courts in other circuits have also split on this issue. *See, e.g.*, *Umatilla Waterquality Protective Ass'n, Inc. v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 1320 (D. Or. 1997) (holding "that discharges of pollutants into groundwater are not subject to

The court agrees with the analysis in *Cape Fear* and *Chevron* and finds that a narrower interpretation of "navigable waters" is more persuasive. The statutory language supports this conclusion given that "navigable waters" and "ground waters" are separate and distinct concepts in the CWA. Further, as the court noted in *Chevron*,

> this narrower interpretation of "navigable waters" is supported by the Supreme Court ruling in *Rapanos v. United States*. . . . There, the Court considered what standard to apply in order to determine if certain *wetlands* constitute "navigable waters" under the CWA. In setting forth tests that excluded

---

the CWA's NPDES permit requirement even if that groundwater is hydrologically connected to surface water"); *Cooper Indus., Inc. v. Abbott Labs.*, No. 93-0193, 1995 WL 17079612, at *4 (W.D. Mich. May 5, 1995) (unpublished) (same); *But see Hawai'I Wildlife Fund v. Cty. of Maui*, 24 F. Supp. 3d 980, 996 (D. Haw. 2014) (holding that "[i]t is the migration of the pollutant into navigable-in-fact water that brings groundwater under the [CWA]"); *Hernandez v. Esso Standard Oil Co. (P.R.)*, 599 F. Supp. 2d 175, 181 (D.P.R. 2009) (holding that "the CWA extends federal jurisdiction over groundwater that is hydrologically connected to surface waters that are themselves waters of the United States"); *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1180 (D. Idaho 2001) (same); *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1319 (S.D. Iowa 1997) (same); *Ass'n Concerned Over Res. & Nature, Inc. v. Tenn. Aluminum Processors, Inc.*, No. 1:10-00084, 2011 WL 1357690, at *17 (M.D. Tenn. Apr. 11, 2011) (unpublished) (same); *Nw. Envtl Def. Ctr. v. Grabhorn, Inc.*, No. CV-08-548-ST, 2009 WL 3672895, at *11 (D. Or. Oct. 30, 2009) (finding that CWA covers discharges to navigable surface waters via hydrologically connected groundwater) (unpublished); *Mut. Life Ins. Co. v. Mobil Corp.*, No. CIVA96CV1781RSP/DNH, 1998 WL 160820, at *3 (N.D.N.Y. Mar. 31, 1998) (same).

> some wetlands from the scope of the CWA, the Supreme Court eschewed a broad interpretation of navigable waters and repeatedly cautioned against "attempting to expand the definition of navigable waters to encompass virtually all water, regardless of its actual navigability, location, or consistency of flow."

113 F. Supp. 3d at 817 (quoting *Cape Fear*, 25 F. Supp. 3d at 809, and citing *Rapanos*, 547 U.S. 715, 733-34 (2006)).

The allegations in the Plaintiffs' complaint are factually similar to the allegations in *Chevron*,[6] involving a petroleum spill from an underground pipeline that contaminated the groundwater and migrated toward surface waters. 113 F. Supp. 3d at 816. In the instant complaint, the Plaintiffs allege that "the gasoline that remains in the area of the spill is breaking down into the hazardous compounds that comprise gasoline . . . and making its way into groundwater supplies, wetlands, and surface waters in Anderson County and the Savannah River watershed." (Compl. ¶ 10, ECF No. 1.) Further, the Plaintiffs allege that the "Defendants' pipeline and the Spill Site are contaminating groundwater, which is closely hyrdrologically connected to the surface water and the wetlands and which is conveying Defendants' petroleum pollution to the surface water and wetlands." (*Id.* ¶ 56, ECF No. 1.) The Plaintiffs

[6] Although *Chevron* involved violations of the Oil Pollution Act as opposed to the CWA, as discussed previously, the Oil Pollution Act and the CWA utilize identical definitions of navigable waters and the court relied heavily on CWA cases.

contend that there are two streams and two wetlands located near the spill site and that "[t]hese water bodies are located in the path of groundwater flow from the spill site." (*Id.* ¶ 11, ECF No. 1.) In addition, the Plaintiffs submit that "[t]he groundwater contamination plume and the petroleum products have moved toward both streams and wetlands since the spill was first discovered, and they continue to move to the streams and wetlands." (*Id.* ¶ 16, ECF No. 1.) Further, the Plaintiffs allege that petroleum and petroleum products have been detected in Browns Creek. (*Id.* ¶ 17, ECF No. 1.) The complaint only alleges that petroleum leaked from the pipeline into the groundwater at the spill site is slowly migrating toward two creeks and two wetlands. As set forth above, the CWA does not apply to claims involving discharge of pollution to groundwater that is hydrologically connected to surface waters. As such, subject matter jurisdiction does not exist over Plaintiffs' CWA claim based on hydrological connection between groundwater and surface water.

For the reasons set forth above, the Plaintiffs' complaint is dismissed pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.[7]

It is therefore

ORDERED that the Defendants' motion to dismiss, docket number 14, is granted.

---

[7] Having found that the Plaintiffs' claims are subject to dismissal, the court declines to address the Defendants' remaining arguments.

IT IS SO ORDERED.

s/Henry M. Herlong, Jr.
Senior United States District Judge

Greenville, South Carolina
April 20, 2017

Appendix D

RELEVANT STATUTORY PROVISIONS

33 U.S.C. § 1251

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter--

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

(c) Congressional policy toward Presidential activities with foreign countries

It is further the policy of Congress that the President, acting through the Secretary of State and such national and international organizations as he determines appropriate, shall take such action as may be necessary to insure that to the fullest extent possible all foreign countries shall take meaningful action for the prevention, reduction, and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimination of discharge of pollutants and the improvement of water quality to at least the same extent as the United States does under its laws.

(d) Administrator of Environmental Protection Agency to administer chapter

Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called "Administrator") shall administer this chapter.

(e) Public participation in development, revision, and enforcement of any regulation, etc.

Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

(f) Procedures utilized for implementing chapter

It is the national policy that to the maximum extent possible the procedures utilized for implementing this chapter shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.

(g) Authority of States over water

It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

33 U.S.C. § 1311(a)

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1342(a)-(d)

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after

opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objectives of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable

waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which--

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the

Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

(c) Suspension of Federal program upon submission of State program; withdrawal of approval of State program; return of State program to Administrator

(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 1314(i)(2) of this title. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 1314(i)(2) of this title.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any

such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(4) Limitations on partial permit program returns and withdrawals

A State may return to the Administrator administration, and the Administrator may withdraw under paragraph (3) of this subsection approval, of--

(A) a State partial permit program approved under subsection (n)(3) only if the entire permit program being administered by the State department or agency at the time is returned or withdrawn; and

(B) a State partial permit program approved under subsection (n)(4) only if an entire phased component of the permit program being administered by the State at the time is returned or withdrawn.

(d) Notification of Administrator

(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State

objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) In any case where, after December 27, 1977, the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this chapter.

33 U.S.C. § 1362(7), (11), (12), (14), (16)

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

* * *

(11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical,

physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

* * *

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

* * *

(14) The term "point source" means 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. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

* * *

(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

33 U.S.C. § 1365(a)(1), (b)(1), (d)

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf--

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

* * *

(b) Notice

No action may be commenced--

(1) under subsection (a)(1) of this section--

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

* * *

(d) Litigation costs

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially

prevailing party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.