No. 18-268

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

BRIEF IN OPPOSITION

Frank S. Holleman III
Counsel of Record
Nicholas S. Torrey
Leslie Griffith
SOUTHERN ENVIRONMENTAL LAW CENTER
601 West Rosemary Street, Suite 220
Chapel Hill, North Carolina 27516-2356
(919) 967-1450
fholleman@selcnc.org

Christopher K. DeScherer
SOUTHERN ENVIRONMENTAL LAW CENTER
463 King Street, Suite B
Charleston, South Carolina 29403

October 23, 2018

QUESTIONS PRESENTED

1. Did the Conservation Groups properly state a claim under the Clean Water Act by alleging that Petitioners are adding petroleum pollutants through groundwater to waters of the United States from a buried pipe near the waterway?

2. Did the Conservation Groups properly allege an ongoing violation of the Clean Water Act where petroleum pollutants from Petitioners' ruptured pipe continue to be added to waters of the United States after the pipe was repaired?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Statutes

Administrative Materials

Legislative Materials

Other Authorities

RULE 29.6 STATEMENT

Respondents Upstate Forever and Savannah Riverkeeper have no parent corporations and have issued no stock to any publicly held company.

INTRODUCTION

The Clean Water Act (the "Act" or "CWA") prohibits the unpermitted discharge of pollutants: "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Congress did not confine this prohibition only to pollution flowing "immediately" or "directly into" navigable waters. Accordingly, courts and agencies have recognized for decades that the Act applies to pollutants from point sources that flow over land, through the air, and via groundwater to navigable waters.

Petitioners misstate the holding below and the holdings of other courts across the country to project an illusion of chaos in the Clean Water Act's protections for surface waters of the United States. In reality, the Fourth Circuit's ruling is consistent with the long-established—and long-implemented—scope of the Act and this Court's decisions.

I. Discharges of Pollutants from a Point Source to Navigable Waters via Groundwater

Petitioners claim the Act exempts unpermitted discharges to navigable waters that travel any distance underground before entering navigable waters, and tell the Court that the Fourth Circuit applied the Act to "discharges of pollutants into groundwater." Pet.12. But that is false. The court

explained: "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." App.26 (emphasis added).[1] The decision below does not expand the meaning of "navigable waters" to include groundwater. Rather, the Fourth Circuit properly applied the statutory definition of "discharge of a pollutant" to conclude that the Clean Water Act does not exempt this particular kind of discharge to surface waters.

Petitioners also claim the ruling below contributes to a circuit split on discharges through groundwater to navigable waters—but no case they identify contradicts the Fourth Circuit's decision. The circuits that have ruled on the issue, with one weeks-old exception decided after the petition, have reached the same conclusion as the Fourth Circuit. Numerous district courts across the country have held the same, throughout four decades.

The just-issued pair of decisions by a divided Sixth Circuit panel does not undermine this consistent trend among the lower courts, and petitions for rehearing are pending in both cases. *Tenn. Clean Water Network v. Tenn. Valley Auth.*, No. 17-6155, 2018 WL 4559103 (6th Cir. Sept. 24, 2018); *Ky. Waterways All. v. Ky. Utils. Co.*, No. 18-5115, 2018 WL 4559315 (6th Cir. Sept. 24, 2018). The Sixth Circuit majority's position (and

[1] References to App. are to Petitioners' appendix.

Petitioners', *see* Pet.24) that the Clean Water Act covers only discharges "directly into" navigable waters is incompatible with the statutory text, which states that the Act covers "any addition" "to navigable waters from any point source." 33 U.S.C. § 1362(12). This definition includes pollution from "container[s]," "concentrated animal feeding operation[s]," and "well[s]," *id.* § 1362(14), all of which Congress designated as point sources and none of which discharges directly into navigable waters. For example, pollution flowing from a well to navigable waters necessarily travels through soil or groundwater.

Petitioners claim the Fourth Circuit's decision, along with the Ninth Circuit's decision in *Hawai'i Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018), has "spawned massive confusion," Pet.2—but in fact, federal and state agencies have been administering permitting programs for such discharges for many years, across many industries including feedlots, oil and gas facilities, chemical plants, and sewer systems. The fact that the Act applies to discharges to surface waters via groundwater flows is well-established.

The United States Environmental Protection Agency ("EPA") recently sought comment on whether it should reconsider its position on this issue, which is another reason for this Court to deny the petition. Though the statutory language is plain, review by this Court is not warranted when the agency may adjust how the statute is implemented and provide any clarification it concludes is needed.

II. Ongoing Violation

As Petitioners' question presented admits, petroleum from their pipeline continues to enter tributaries of the Savannah River. These facts satisfy every element of the Act's "discharge of a pollutant" definition and constitute an ongoing violation enforceable by citizen suit. No circuit has decided otherwise. The Fourth Circuit's decision follows the plain text of the statute and preserves the limited but important role for citizen suits this Court recognized in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987).

Because the decision below is consistent with the plain text of the Act and the longstanding rulings of this Court, the lower courts, and EPA, certiorari is not warranted.

STATEMENT OF THE CASE

I. Clean Water Act

To "restore and maintain ... the Nation's waters," the Clean Water Act prohibits the unpermitted "discharge of any pollutant by any person." 33 U.S.C. §§ 1251(a), 1311(a). Congress defined "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). A point source is "any discernible, confined and discrete conveyance." *Id.* § 1362(14). This includes, but is not limited to, "any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, [or] concentrated animal feeding operation ... from which pollutants are or may be discharged." *Id.*

Citizens may enforce the Clean Water Act against any person "alleged to be in violation of" the

fundamental prohibition against unpermitted discharges. *Id.* §§ 1365(a)(1), (f)(1). A citizen plaintiff must allege "a state of either continuous or intermittent violation" to establish jurisdiction over the citizen suit. *Gwaltney*, 484 U.S. at 57.

II. Facts

Petitioners' Plantation Pipeline runs near wetlands and tributaries of the Savannah River in Anderson County, South Carolina. App.6. Browns Creek—a tributary and headwater of the Savannah River—and Cupboard Creek flow within several hundred feet of the pipeline. App.6–7.

In late 2014, local residents discovered dead plants, smelled gas, and saw gasoline pooled near the pipeline. App.6. Several feet underground, over 369,000 gallons of petroleum were spilling from the pipeline where an aged patch had failed. App.6, 55.

The petroleum quickly began entering Browns Creek, as water testing confirmed. App.7–8. Though Petitioners later patched the pipe, Petitioners never stopped petroleum flowing to Browns Creek and the surrounding surface waters. Gasoline flows to this stream through groundwater and via seeps that emerge and flow aboveground to the waterway. App.6–7, 9.

Testing in Browns Creek since the spill has consistently found petroleum pollutants including benzene, toluene, ethylbenzene, and xylenes. App.7, 62. Testing nearly two years after the spill showed increasing pollutant levels. App.8. Petroleum continues to flow to the nearby creeks and wetlands.

III. Proceedings Below

Respondents Upstate Forever and the Savannah Riverkeeper (the "Conservation Groups"), are nonprofit membership public interest organizations working to protect the waters of Anderson County and the Savannah River Basin. App.6. Recognizing that Petitioners would keep polluting the surrounding waterways, the Conservation Groups gave the statutorily required notice in late 2016 that Petitioners were violating the Clean Water Act and that the Conservation Groups intended to enforce the Act. 33 U.S.C. § 1365(b)(1)(A).

After sixty days without action from Petitioners or the state, the Conservation Groups filed this citizen suit in the District of South Carolina. The complaint stated that Petitioners were violating the Act by discharging petroleum products from their pipeline to Browns Creek and other nearby creeks and wetlands without a permit. App.8–9.

The district court granted Petitioners' motion to dismiss. App.72. It ruled that gasoline entering creeks and wetlands from Petitioners' pipeline was not a continuing discharge because the pipeline was now repaired and did not discharge "directly into navigable waters." App.62–63. It also refused to apply the Clean Water Act to discharges to navigable waterways through groundwater. App.72.

The Fourth Circuit reversed. App.2. It held that "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." *Id.* The Fourth Circuit noted "that the CWA, like other environmental statutes,

authorizes 'prospective relief' that only can be attained while a violation is ongoing and susceptible to remediation." App.13 (quoting *Gwaltney*, 484 U.S. at 57). "[T]he 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.'" App.15 (quoting 33 U.S.C. § 1362(12)(A)).

Applying that statutory definition, the Fourth Circuit held that the Conservation Groups alleged an ongoing unpermitted discharge because pollutants from the pipeline continue to enter Browns Creek and other navigable waters. It rejected the idea that "pollution becomes 'nonpoint source pollution' not covered by the CWA at the moment when the point source no longer actively releases the pollutant." App.15 n.7. Whether or not the pipeline is repaired, the "pollution is traceable not to dispersed activities and nonpoint sources but to Kinder Morgan's pipeline, a discrete source." *Id.*

The Fourth Circuit also held that the Clean Water Act's prohibition on unpermitted discharges covers discharges where pollutants travel from a point source less than 1,000 feet through groundwater to navigable waters. In light of Justice Scalia's plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), the Fourth Circuit observed that the Clean Water Act by its plain text prohibits discharges "from" a point source, not just discharges "directly from" a point source. App.20 (quoting 33 U.S.C. § 1362(12)(A)). Because the plain, dictionary definition of "from" indicates a "starting point," the Fourth Circuit determined that a point source "need not also convey the discharge directly to navigable waters." App.21.

The Fourth Circuit emphasized that it was not applying the Clean Water Act to discharges into groundwater itself, but rather to discharges passing through groundwater to navigable waters: "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." App.12 n.5.

The Fourth Circuit adopted the position "consistently" taken by EPA "that the Act applies to discharges 'from a point source via ground water that has a direct hydrologic connection to surface water.'" App.23 (citations omitted). There is "no functional difference" between this standard and that adopted by the Ninth Circuit in *Hawai'i Wildlife Fund,* 886 F.3d at 749. App.24 n.12.

Judge Floyd dissented, finding no ongoing discharge because the pipeline "is not currently leaking or releasing any pollutants." App.40. However, he did not disagree that the Clean Water Act prohibits unpermitted point source discharges to navigable waters through groundwater.

The Fourth Circuit denied Petitioners' petition for rehearing en banc.

REASONS FOR DENYING THE PETITION

The Fourth Circuit's ruling that the Clean Water Act applies to pollution flowing a short distance through groundwater to reach navigable waters is consistent with the statutory language and the well-established scope of the Clean Water Act as it has been implemented by courts, regulation, and permitting agencies throughout the nation for decades. With the consistent weight of precedent set

against one very recent outlier, there is no developed circuit split and no need for Court intervention.

Certiorari is also inappropriate because EPA is currently reviewing its position on the Clean Water Act's coverage of such discharges. The Court should not intervene while this EPA process is ongoing.

Because the ongoing violation question is based on an unusual fact pattern—on which no other circuit has ruled—it is inappropriate for the Court. Because it goes to subject matter jurisdiction, so too is the case as a whole.

I. Certiorari Is Not Warranted on the Clean Water Act's Application to Discharges to Surface Waters Through Groundwater.

A. The Fourth Circuit Joined Courts Nationwide.

The Fourth Circuit's decision reaffirms courts' nearly unanimous acknowledgment and approval of Clean Water Act regulation of these discharges, adheres to this Court's precedents, and derives directly from the text of the Act. Further review is unwarranted.

1. For Decades, Courts Have Agreed that the Act Does Not Exempt Discharges to Surface Waters Through Groundwater.

Since the passage of the Act, the circuits and the overwhelming majority of district courts to have ruled on this issue have agreed that the Clean Water Act applies to discharges of pollutants from a point source to waters of the United States through a short distance of groundwater. This consensus includes decisions from circuits the Petition wrongly suggests

disagree with the Fourth Circuit. The circuit split the Petition identifies is nonexistent.

Instead, in upholding permits, permitting programs, and citizen suits, circuits have recognized that the Clean Water Act covers discharges from a point source to navigable waters that are conveyed via groundwater flows. These decisions—and others recognizing additional kinds of indirect discharges—are consistent with the Court's statement in *Rapanos* that the Act's protections are not limited to point source discharges "directly" into navigable waters.

The Second Circuit upheld EPA's regulation of pollutant discharges from concentrated animal feeding operations ("CAFOs") to surface waters "via groundwater." *Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 515 (2d Cir. 2005). The CAFO regulation the Second Circuit upheld has been in place for some fifteen years, and CAFOs around the country comply with Clean Water Act discharge permits implementing it. *See infra* 29–30.

The Seventh Circuit upheld Clean Water Act permitting requirements for underground injection wells, explaining that the Act covers discharges to surface waters through those wells. *U.S. Steel Corp. v. Train*, 556 F.2d 822, 852 (7th Cir. 1977), *overruled on other grounds by City of W. Chi. v. U.S. Nuclear Regulatory Comm'n*, 701 F.2d 632, 644 (7th Cir. 1983). The court noted that when Congress was considering the Safe Drinking Water Act, it recognized that the Clean Water Act already covered such discharges. *Id.* at 852 n.61.

The Tenth Circuit, in a challenge to National Pollutant Discharge Elimination System ("NPDES")

permits regulating discharges from uranium mining facilities to a dry arroyo and creekbed that flowed underground to navigable waters, upheld Clean Water Act coverage of flows carrying pollutants "through underground acquifers [*sic*]. . . . into navigable-in-fact streams." *Quivira Mining Co. v. EPA*, 765 F.2d 126, 130 (10th Cir. 1985). Tenth Circuit precedents "foreclose any argument" that would exempt discharges to surface waters through groundwater flows. *Friends of Santa Fe Cty. v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1358 (D.N.M. 1995).

The Ninth Circuit unanimously ruled that the Clean Water Act applied to pollutants from a sewage treatment facility's underground wells that were "fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water." *Haw. Wildlife Fund*, 886 F.3d at 749. As the Ninth Circuit explained, the Act is not limited to circumstances "where the point source itself directly feeds into the navigable water." *Id.* at 748. The court held that the Act bars a polluter "from doing indirectly that which it cannot do directly." *Id.* at 752.

This reasoning follows other decisions over nearly four decades recognizing that the Clean Water Act does not exempt "indirect" discharges from a point source that flow over the land, or pass through the air, before entering navigable waters. *Peconic Baykeeper, Inc. v. Suffolk Cty.*, 600 F.3d 180, 188–89 (2d Cir. 2010) (pesticide sprayers discharging through the air to surface waters); *League of Wilderness Defs. v. Forsgren,* 309 F.3d 1181, 1185

(9th Cir. 2002) (same); *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 119 (2d Cir. 1994) (recognizing vehicle spraying manure on fields as point source and subsequent runoff to navigable waters as discharge subject to the Act); *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45 (5th Cir. 1980) ("collection, and subsequent percolation" of waters in mine pits, along with pollutants carried from manmade sediment basins to navigable waters "by gravity flow of rainwater," are covered by the Act).

The Ninth Circuit noted that restricting the Act to cover only direct discharges "would necessarily preclude liability" in these longstanding decisions. *Haw. Wildlife Fund*, 886 F.3d at 748. Its decision avoided, rather than created, a circuit split.

The Fourth Circuit's ruling is entirely consistent with these prior decisions. The Fourth Circuit held that "the plain language of the CWA requires only that a discharge come 'from' a 'point source,'" as its "starting point," App.20–21, and that pollution from a point source need not be "seamlessly channeled" to navigable water to fall within the Act. App.21. Instead, the Act applies where a clear groundwater connection conveys pollutants from a point source to navigable waters. App.22. The majority found "no merit" to the concern that the court's holding "will result in unintended coverage under the CWA," App.16, but pointed out that if "the presence of a short distance of soil and ground water were enough to defeat a claim," such a holding would "greatly undermine" the Act. App.25.

Overwhelmingly, the district courts agree. Far from a "consensus" supporting Petitioners' artificially

narrow reading of the Act, Pet.16, the vast majority have held that the Clean Water Act applies to discharges such as Petitioners' that originate from a point source and enter nearby surface waters via groundwater. *Flint Riverkeeper, Inc. v. S. Mills, Inc.*, 276 F. Supp. 3d 1359, 1367 (M.D. Ga. 2017), *aff'd,* 261 F. Supp. 3d 1345 (M.D. Ga. 2017); *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428, 445 (M.D.N.C. 2015); *Ohio Valley Envtl. Coal. Inc. v. Pocahontas Land Corp.*, No. 3:14-11333, 2015 WL 2144905, at *8 (S.D.W. Va. May 7, 2015); *S.F. Herring Ass'n v. Pac. Gas & Elec. Co.*, 81 F. Supp. 3d 847, 863 (N.D. Cal. 2015); *Raritan Baykeeper, Inc. v. NL Indus., Inc.*, No. 09-cv-4117 (JAP), 2013 WL 103880, at *15 (D.N.J. Jan. 8, 2013); *Tenn. Riverkeeper, Inc. v. Hensley-Graves Holdings, LLC*, No. 2:13-CV-877-LSC, 2013 WL 12304022, at *6 (N.D. Ala. Aug. 20, 2013); *Ass'n Concerned Over Res. & Nature, Inc. v. Tenn. Aluminum Processors, Inc.*, No. 1:10-00084, 2011 WL 1357690, at *17–18 (M.D. Tenn. April 11, 2011); *Greater Yellowstone Coal. v. Larson*, 641 F. Supp. 2d 1120, 1138 (D. Idaho 2009); *Nw. Envtl. Def. Ctr. v. Grabhorn, Inc.*, No. CV-08-548-ST, 2009 WL 3672895, at *11 (D. Or. Oct. 30, 2009); *Hernandez v. Esso Std. Oil Co.*, 599 F. Supp. 2d 175, 181 (D.P.R. 2009); *Coldani v. Hamm*, No. 2:07-CV-0660 JAM EFB, 2008 WL 4104292, at *7–8 (E.D. Cal. Aug. 16, 2007); *N. Cal. River Watch v. Mercer Fraser Co.*, No. C-04-4620 SC, 2005 WL 2122052, at *3 (N.D. Cal. Sept. 1, 2005); *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1180 (D. Idaho 2001); *Mut. Life Ins. Co. of N.Y. v. Mobil Corp.*, No. CIVA96CV1781RSP/DNH, 1998 WL 160820, at *3 (N.D.N.Y. Mar. 31, 1998); *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1319–20 (S.D.

Iowa 1997); *Wash. Wilderness Coal. v. Hecla Mining Co.*, 870 F. Supp. 983, 990 (E.D. Wash. 1994); *Sierra Club v. Colo. Ref. Co.*, 838 F. Supp. 1428, 1434 (D. Colo. 1993); *McClellan Ecological Seepage Situation v. Weinberger*, 707 F. Supp. 1182, 1195–96 (E.D. Cal. 1988), *vacated on other grounds*, 47 F.3d 325 (9th Cir. 1995); *New York v. United States*, 620 F. Supp. 374, 381 (E.D.N.Y. 1985).

Petitioners' reliance on Fifth and Seventh Circuit cases only shows how they have misread the decision here. These cases merely held that groundwater itself is not a water of the United States—a point with which the Fourth Circuit agreed. *Rice v. Harken Expl. Co.*, 250 F.3d 264, 269 (5th Cir. 2001) (the "definition [of 'navigable waters'] is not so expansive as to include groundwater"); *Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994). As the Ninth Circuit explained:

> We are not suggesting that the CWA regulates all groundwater. Rather, in fidelity to the statute, we are reinforcing that the Act regulates point source discharges to a navigable water, and that liability may attach when a point source discharge is conveyed to a navigable water through groundwater. Our holding is therefore consistent with *Rice*, where the Fifth Circuit required some evidence of a link between discharges and contamination of navigable waters, and with *Dayton Hudson*.

Haw. Wildlife Fund, 886 F.3d at 746 n.2 (citation omitted). The undisputed proposition that

groundwater is not a jurisdictional water of the United States does not exempt point source pollution added via groundwater to nearby navigable waters.

Petitioners' other attempts to overstate a conflict are similarly unavailing. Consistent with its decision in *Quivira*, the Tenth Circuit in *Sierra Club v. El Paso Gold Mines* upheld Clean Water Act coverage of discharges of pollutants from a point source mine shaft "which flow[] through other [underground] conveyances to navigable waters," as in this case. 421 F.3d 1133, 1141 (10th Cir. 2005).

In *United States v. Johnson*, 437 F.3d 157 (1st Cir. 2006), *vacated*, 467 F.3d 56 (1st Cir. 2006), the court considered whether the U.S. Army Corps of Engineers had jurisdiction under Section 404 of the Act over certain wetlands "hydrologically connected" to navigable waters, and merely stated in a footnote that the Act "covers only surface water" and not groundwater. *Id.* at 161 n.4. This unremarkable proposition is not in dispute.

Cordiano v. Metacon Gun Club, Inc. is similarly irrelevant: contamination conveyed by groundwater was not an issue because there was no evidence that the pollutants leached into the groundwater. 575 F.3d 199, 222–23 (2d Cir. 2009). Moreover, that decision referred to and should be read in light of *Waterkeeper Alliance, Inc. v. EPA*, where the Second Circuit upheld Clean Water Act coverage of discharges from a point source to navigable waters through groundwater. 399 F.3d at 515. The Second Circuit also has upheld coverage of other indirect discharges to navigable waters through the air or flowing overland. *Peconic Baykeeper*, 600 F.3d at

188–89; *Concerned Area Residents for the Env't*, 34 F.3d at 119.

Like the Second Circuit, the Fifth Circuit's *Sierra Club v. Abston Construction* ruling held that the Act applies to discharges from a point source that flow over the surface of the land before entering navigable waters. 620 F.2d at 45. The Fifth Circuit explained that the Act's prohibition on unpermitted point source discharges does not apply to "natural rainfall drainage over a broad area" from fields or roads, which are classic nonpoint sources. *Id.* at 44. However, it recognized that an *initial* point source is enough: "if the miner *at least initially* collected or channeled the water and other materials" then overland "gravity flow, resulting in a discharge into a navigable body of water, may be part of a point source discharge" covered by the Act. *Id.* (emphasis added). The decision below likewise recognizes that to be covered by the plain language of the Act, point sources need not discharge directly into U.S. waters.

Against the myriad decisions supporting the Fourth Circuit's ruling, *supra* 13–14, Petitioners cite just four district court cases. Two misconstrued Congress's choice to exclude groundwater from "waters of the United States" as a license to pollute protected surface waters *through* groundwater, and a petition for rehearing in the Kentucky appeal is now pending. *Ky. Waterways All. v. Ky. Utils. Co.*, No. 5:17-292-DCR, 2017 WL 6628917, at *9 (E.D. Ky. Dec. 28, 2017); *Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc.*, 25 F. Supp. 3d 798, 810 (E.D.N.C. 2014). Two others erroneously assumed that a point source discharge directly into surface waters was required. *Tri-Realty Co. v. Ursinus Coll.*,

No. 11-5885, 2013 WL 6164092, at *8 (E.D. Pa. Nov. 21, 2013); *26 Crown Assocs., LLC v. Greater New Haven Reg'l Water Pollution Control Auth.*, No. 3:15-cv-1439, 2017 WL 2960506, at *7 (D. Conn. July 11, 2017) (dictum), *appeal pending*. But the undisputed proposition that groundwater is not a point source does not exempt pollution from a point source that travels a short distance through groundwater, just as it does not exempt pollution from a point source that flows over land or through the air to navigable waters. As Justice Scalia explained in *Rapanos* and the Second Circuit explained in *Waterkeeper Alliance*, the Act's protections are not restricted to discharges that travel exclusively through point sources. *Rapanos*, 547 U.S. at 743; *Waterkeeper All.*, 399 F.3d at 510–11; *see infra* at 19.

The Sixth Circuit's recent divided decision stands alone among the circuits. But with rehearing petitions pending and the vast weight of authority coming down on the other side, that decision gives no reason to review the Fourth Circuit's conclusion here. In addition, the Sixth Circuit's approach is new to the Courts of Appeals, and other circuits have not had an opportunity to consider it.

The novelty of the Sixth Circuit majority's conclusion is unsurprising, because its textual analysis chose the wrong text. Rather than evaluating the relevant statutory text—prohibiting the *unpermitted* "discharge of a pollutant," which is "any addition of any pollutant to navigable waters from any point source"—the Sixth Circuit fixated on a separate term, "effluent limitation." But this term applies only to certain *permitted* discharges and, as the dissent noted, is "simply irrelevant to this

lawsuit." *Ky. Waterways All.*, 2018 WL 4559315, at *14 (Clay, J., dissenting). Looking at one word, "into," from the definition of that inapposite term, the majority hypothesized that "'into' indicates directness." *Id.* at *7 (majority opinion). That the Sixth Circuit had to abandon the relevant statutory text to reach this anomalous conclusion shows just how far from the rest of the courts it diverged. Moreover, its atextual "direct" discharge theory contradicts the statute's definition of "point source," which includes point sources like wells that can only discharge to surface waters through groundwater, along with CAFOs and containers, none of which discharges directly into surface waters. 33 U.S.C. § 1362(14). Unlike the Sixth Circuit's outlier position, the Fourth Circuit's decision applies the relevant statutory language and the logic of other circuits.

2. The Fourth Circuit Followed the Statute and this Court's Precedent.

The Fourth Circuit took Congress at its word. The text of the Clean Water Act prohibits the unpermitted "discharge of any pollutant by any person." 33 U.S.C. § 1311(a). "[D]ischarge of a pollutant" means "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). This broad language applies to pollutants "from" any point source. It is not limited to point sources that empty "directly into" navigable waters, nor is it limited to additions of pollution "by" the point source—"those are not the words that Congress wrote." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 629 (2018).

As Justice Scalia explained in *Rapanos*, "[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,'" and courts "from the time of the CWA's enactment" have enforced the Act "even if the pollutants discharged from a point source do not emit 'directly into' covered waters, but pass 'through conveyances' in between." 547 U.S. at 743 (citations omitted). Such conveyances need not be point sources that discharge directly into navigable waters, contrary to Petitioners' amicus. Am. Br. Pac. Legal Found. 7–8.

Instead, the *Rapanos* plurality recognized and preserved two separate paths to Clean Water Act coverage under existing precedent: chains of point sources, and discharges from a point source that are otherwise conveyed to navigable waters. 547 U.S. at 743–44. Because the relevant statutory language—"any addition ... to navigable waters"—is not limited to discharges "directly into" navigable waters, the plurality concluded that "any addition" means "any addition," direct or indirect. *Id.* at 743. Indeed, no Justice disagreed with this portion of the opinion.

This reasoning is consistent with *South Florida Water Management District v. Miccosukee Tribe of Indians*, which held that point sources are covered by the Act even if they are not the original source. 541 U.S. 95, 105 (2004). It did not hold (as Petitioners would have it) that the Act covers *only* point sources that convey pollutants directly into navigable waters. *Id.*

Consequently, as EPA and the Department of Justice have stated, the Act covers "not only

discharges directly to navigable waters, but also discharges of pollutants that travel from a point source to navigable waters over the surface of the ground or through underground means." Brief for the United States as Amicus Curiae, *Haw. Wildlife Fund v. Cty. of Maui*, No. 15-17447 (9th Cir.) (attached to Mtn. for Leave to File Supp. Materials, Dkt. 16 (order granted, Dkt. 91)), at 10.

By contrast, Petitioners' argument would insert a requirement that only discharges from a point source "directly" into navigable waters are covered. But the text contains no such requirement. To be covered by the Act, a discharge must originate "from" a discernible, confined, and discrete conveyance, like Petitioners' pipe, and must be added "to" navigable waters—but the Act is not confined to pollution by one or more point sources feeding directly into the navigable water. On this point the panel was unanimous. Though Petitioners cite Judge Floyd's dissent, Pet.35, the dissent merely reasoned that "to constitute a CWA violation, a point source must have been *involved* in the discharging activity." App.41 (emphasis added). And the Fourth Circuit recently reaffirmed that "the addition of a pollutant into navigable waters *via groundwater*" is subject to the Act, although it concluded that the pollution in that case did not originate from a point source—unlike the statutorily enumerated point source pipe here. *Sierra Club v. Va. Elec. & Power Co.*, 903 F.3d 403, 409 (4th Cir. 2018).

Petitioners would exempt pollution from a point source to navigable waters by artificially segmenting it into a so-called "initial discharge" and "subsequent migration" through groundwater, labeling the latter

nonpoint source pollution. Pet.25; Am. Br. Am. Petroleum Inst. 12. But nonpoint source pollution "arises from many dispersed activities over large areas, and is not traceable to any single discrete source." *League of Wilderness Defs.*, 309 F.3d at 1183. As EPA explained, "nonpoint source pollution does not result from a discharge at a specific, single location (such as a single pipe)." EPA Office of Water, *Nonpoint Source Guidance* at 3 (1987).[2] Petitioners' pipe is the undisputed source of the pollutants here, so the nonpoint source label cannot apply.

Moreover, although the plain text of the Clean Water Act dictated the Fourth Circuit's holding, its conclusion also honors the statutory scheme Congress designed, balances other state and federal regulatory regimes, and provides a practical standard for courts to apply. As the Fourth Circuit recognized, App.12 n.5, its decision respects Congress's decision not to include groundwater as a "water of the United States," which no party disputes. Petitioners' foray into legislative history, Pet.22–23, only underscores this agreed-upon point.

But Congress also understood that surface water discharges through groundwater can be regulated by the Act: far from "creat[ing] a ground water loophole through which the discharges of pollutants could flow, unregulated, to surface water …. Congress expressed an understanding of the hydrologic cycle and an intent to place liability on those responsible for discharges which entered the 'navigable waters.'" NPDES Permit Regulation and

---

[2] https://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=910217GL.TXT.

Effluent Limitations Guidelines and Standards for CAFOs, 66 Fed. Reg. 2,960, 3,016 (Jan. 12, 2001). Indeed, Congress expressly noted when it passed the Safe Drinking Water Act in 1977 that the Clean Water Act already regulated underground deep water wells when there is an associated "discharge into navigable waters." H.R. Rep. No. 93-1185, at 6457 (1974).

But the truest measure of Congress's intent is "the text of the enrolled bill that became law." *Graham Cty. Soil & Water Conservation Dist. v. United States*, 559 U.S. 280, 302 (2010) (Scalia, J., concurring in part and concurring in judgment). In addition to broadly defining "discharge of a pollutant," Congress defined a "point source" to include a "container," a "concentrated animal feeding operation," and a "well." 33 U.S.C. § 1362(14). Pollutants discharged through injection wells, like those at issue in *Hawai'i Wildlife Fund*, can reach surface waters only through groundwater. *See U.S. Steel Corp.*, 556 F.2d at 852 (Act regulates "'pollutants' when injected into wells" in circumstances other than "'production of oil or gas'"). Additionally, pollutants discharged to navigable waters from containers and CAFOs must also travel some distance through or over other media before reaching the navigable water. Congress's designation of wells, containers, and CAFOs as point sources reflects its intent that the Act regulate all discharges from point sources to navigable waters, direct and indirect, including discharges through groundwater. Congress has amended the Act multiple times without refuting the courts' and EPA's longstanding application of the statutory text to such discharges. *See* EPA, History of the Clean

Water Act, https://www.epa.gov/laws-regulations/history-clean-water-act (last visited Oct. 14, 2018).

Allowing an exception to Clean Water Act coverage for indirect discharges through groundwater would create a gap in water protections that Congress never intended. Petitioners and Amici cite as an alternative the Resource Conservation and Recovery Act ("RCRA"), among other statutes, but they contend only that these statutes "address ... groundwater pollution," not that they prevent surface water pollution like that prompting this citizen suit. Pet.28, *accord* Am. Br. Chamber Comm. 7. For example, RCRA expressly excludes point source discharges to surface waters. 42 U.S.C. § 6903(27); 40 C.F.R. § 261.4(a)(2) cmt. Petitioners' argument is a red herring: Congress enacted the Clean Water Act to address pollution of navigable waters from point sources like Petitioners' pipe, and the Fourth Circuit correctly applied the Act to this unlawful pollution of surface waters.

Likewise, this case illustrates that only the Clean Water Act, not state groundwater regulation that Petitioners and Industry amici tout, is directed at stopping the ongoing addition of pollutants to navigable waters. Pet.28; Am. Br. Chamber Comm. 5–6. The fact that state regulations apply to the spill site but have failed to stop Petitioners' ongoing discharges to navigable waters demonstrates the unique role Congress established for the Clean Water Act: to eliminate illegal discharges of pollutants to the nation's waters.

Courts and agencies are adequately equipped to apply the Act's protection against such discharges—

and they already do. EPA has explained that applying the Act to discharges via a groundwater connection to surface waters is "a factual inquiry like all point source determinations." 66 Fed. Reg. at 3,017. "A general hydrological connection between all groundwater and surface waters is insufficient." Am. Br. U.S., *Haw. Wildlife Fund*, Dkt. 16 at 24. Instead, what matters is whether pollutants "proceed[] from the point of injection to the surface water without significant interruption. Relevant evidence includes the time it takes for a pollutant to move to surface waters, the distance it travels, and its traceability to the point source." *Id.* at 26 (citing 66 Fed. Reg. at 3,017).

Consistent with the statute and EPA's position, the Fourth Circuit explained that covered discharges "must be sufficiently connected to navigable waters" and "traceable" in "measurable quantities" to the point source based on a site-specific factual inquiry. App.22, 25. Only those discharges flowing to surface waters from an identifiable point source are subject to the Clean Water Act.

While the Fourth Circuit and Ninth Circuit used slightly different language to describe their analysis of the covered discharges, the Fourth Circuit acknowledged that there is no functional difference in the factual inquiry: whether the pollutants being added to surface waters are from the defendant's point source. App.24 n.12. As the Sixth Circuit dissent stated, the plaintiff must "prove the existence of pollutants in the navigable waters and ... persuade the factfinder that the defendant's point source is to blame." *Ky. Waterways All.*, 2018 WL 4559315, at *14. Indeed, courts must make this determination in

any unpermitted discharge case under the Clean Water Act, regardless of whether it involves groundwater.

3. Petitioners Misconstrue the Holding Below.

Petitioners' question presented misstates the Fourth Circuit's holding and makes plain that certiorari is not appropriate.

Petitioners imply that the decision below applied the Clean Water Act to "discharges into soil or groundwater whenever there is a 'direct hydrological connection' between the groundwater and nearby navigable waters." Pet. at i. But the Fourth Circuit did no such thing. It ruled that the Act applies to discharges to surface waters, not soil or groundwater. The decision does not expand "navigable waters" to include soil or groundwater, nor does it eliminate the requirement for a point source. The Conservation Groups will have to prove at trial that petroleum pollutants from a point source, Petitioners' pipeline, are discharging to Browns Creek and other surface waters after passing a short distance over or under ground.

Petitioners' first question also asks "[w]hether the Clean Water Act's permitting requirement is confined to discharges from a point source to navigable waters," as if that approach contradicted the Fourth Circuit's ruling. But in fact, the Fourth Circuit applied the Act only to discharges from a point source (Petitioners' pipe) to navigable waters. What it refused to do was artificially confine the Act to point sources that discharge "directly" or

"immediately" into navigable waters, because the Act contains no such limitation.

Finally, the question frames the issue in terms of a "permitting requirement," implying that discharges must be eligible for a permit in order to be subject to the Act. But the Act prohibits the unpermitted discharge of pollutants and imposes strict liability regardless of whether a permitting program exists. *See infra* 37.

B. An Ongoing EPA Process Makes Certiorari Inappropriate.

EPA currently is reviewing its position on the scope of the Clean Water Act's coverage of discharges to surface waters via groundwater, further weighing against certiorari. The Fourth Circuit's reading of the Act's plain text parallels decades of EPA policy. But with the agency now revisiting that understanding, this Court's involvement would be premature.

Over four decades, through the administrations of both parties, EPA consistently affirmed—by regulation, guidance, and permitting practice—that the Clean Water Act applies to discharges of pollutants to navigable waters via groundwater flows. EPA's CAFO rulemaking summarized this longstanding conclusion, recognized that whether such a discharge "constitutes an illegal discharge to waters of the U.S. if unpermitted is a fact specific one," and analogized it to other routine, fact-based determinations under the Act. 66 Fed. Reg. at 3,018. EPA clarified subsequently that "nothing in the 2003 [final] rule was to be construed to expand, diminish, or otherwise affect the jurisdiction of the [Act] over

discharges to surface water via groundwater that has a direct hydrologic connection to surface water." Revised NPDES Regulation and Effluent Limitations Guidelines for CAFOs in Response to the Waterkeeper Decision, 73 Fed. Reg. 70,417, 70,420 (Nov. 20, 2008). In 2015, EPA again reaffirmed its "longstanding and consistent interpretation" and noted that it is unaffected by "the exclusion of groundwater from the definition of 'waters of the United States.'" EPA, *Response to Comments—Topic 10 Legal Analysis* 386 (June 30, 2015), https://19january2017snapshot.epa.gov/sites/production/files/2015-06/documents/cwr_response_to_comments_10_legal.pdf.

Long before its CAFO rulemaking, EPA recognized that the Act covers such discharges. Reissuance of NPDES General Permits for Storm Water Discharges from Construction Activities, 63 Fed. Reg. 7,858, 7,881 (Feb. 17, 1998) ("EPA interprets the CWA's NPDES permitting program to regulate discharges to surface water via groundwater where there is a direct and immediate hydrologic connection"); Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,892 (Dec. 12, 1991) ("the Act requires NPDES permits for discharges to groundwater where there is a direct hydrological connection between groundwaters and surface waters."); NPDES Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990, 47,997 (Nov. 16, 1990) (stormwater rules cover discharges through hydrologically connected groundwater). EPA reiterated this position in its Ninth Circuit amicus brief, and

explained that "EPA and states have been issuing permits for this type of discharge" across many industries. Am. Br. U.S., *Haw. Wildlife Fund*, Dkt. 16 at 30.

However, EPA is currently evaluating "whether the Agency should consider clarification or revision" of the Agency's previous statements on this issue. Clean Water Act Coverage of "Discharges of Pollutants" via a Direct Hydrologic Connection to Surface Water, 83 Fed. Reg. 7,126, 7,126 (Feb. 20, 2018). EPA has solicited public comment on its previous statements and the issue of Clean Water Act coverage of discharges via groundwater flows. *Id.*

EPA's current process may result in new guidance or regulations. Although the Act's text is plain, and the Fourth Circuit's decision turned on that plain text, it would be premature for the Court to intervene while this executive activity is in process.

C. Further Review Would Unnecessarily Disrupt Existing Clean Water Act Regulation of Indirect Discharges.

Petitioners claim the decision below changed the law. But in fact, Clean Water Act coverage of discharges through groundwater has been implemented for decades. Petitioners would upend well-established Clean Water Act permitting practice covering such discharges. Given the longstanding and widespread application of the Act to these discharges, a rush to certiorari is unwarranted.

Without any evidence, the state amici posit dire consequences they claim *might* follow a decision by

this Court. But they fail to acknowledge that Clean Water Act coverage of surface water discharges via groundwater is *already* recognized in jurisdictions spanning dozens of states, *see supra* at 10–14, and in many instances has been for decades. At the same time, they ignore the upheaval that would result if this pollution of the Nation's waters were removed from the scope of the Clean Water Act.

Petitioners' desired result would not only contradict the plain language of the Act, but also would dismantle Clean Water Act permitting programs across the country that agencies have administered for years. These protections have been implemented by EPA consistently for four decades, reaching back to EPA's injection well permitting in the 1970s. *See U.S. Steel Corp.*, 556 F.2d at 852. As EPA recently explained, "EPA and states have been issuing permits for this type of discharge [through a groundwater connection] from a number of industries, including chemical plants, concentrated animal feeding operations, mines, and oil and gas waste-treatment facilities." Am. Br. U.S., *Haw. Wildlife Fund*, Dkt. 16 at 30.

For example, EPA's standard permits for CAFOs regulate discharges "to surface waters of the United States through groundwater with a direct hydrologic connection to surface waters." EPA Region 6, NPDES General Permit for CAFOs in New Mexico, Part III.D.1 (Sept. 1, 2016);[3] EPA Region 10, NPDES Permit for CAFOs in Idaho, No. IDG010000

[3] https://19january2017snapshot.epa.gov/sites/production/files/2016-07/documents/nmg010000_final_permit_nm_cafo-signed.pdf.

at 30 (Mar. 29, 2012)[4] (requiring synthetic liner, leak detection system, or other measures if "the potential exists for the contamination of surface waters or ground water with a direct hydrologic connection to surface water"). CAFO permits in delegated state programs around the country also regulate such discharges. *E.g.*, Texas General Permit, No. TXG920000 at 33–34 (July 9, 2009)[5] (requiring new or modified "retention control structure" impoundments to "meet the requirements for lack of hydrologic connection or have a liner").

NPDES permits also regulate discharges to navigable waters through groundwater for, among others, mining operations, wastewater treatment plants, and—contradicting amici's fears of burdensome new permitting—the very few septic systems that discharge to surface waters. *E.g.*, EPA Region 6, Questa Mine Final Permit Decision, Part II.D (May 31, 2016)[6] (prohibiting discharges through groundwater "to the Red River of pollutants traceable to point source mine operations except in trace amounts"); EPA Region 10, Taholah Village Wastewater Treatment Plant, No. WA0023434[7] (June 4, 2015) (wastewater treatment basins discharging to Quinault River through groundwater); EPA, Response to Congress on Use of Decentralized

---

[4] https://www.epa.gov/sites/production/files/2017-12/documents/r10-npdes-idaho-cafo-gp-id010000-final-permit-2012.pdf.

[5]https://www.tceq.texas.gov/assets/public/permitting/wastewater/general/txg920000.pdf.

[6] https://www.env.nm.gov/swqb/NPDES/Permits/NM0022306-Chevron-Questa.pdf.

[7] https://www.epa.gov/sites/production/files/2017-09/documents/r10-npdes-taholah-wa0023434-final-permit-2015.pdf.

Wastewater Treatment Systems[8] at 5 (Apr. 1997), (the rare septic systems "which discharge to a surface water must, and can," meet requirements of NPDES permitting program); *accord United States v. Lucas*, 516 F.3d 316, 332 (5th Cir. 2008) (underground septic systems discharging to jurisdictional wetlands require NPDES permits).

All these existing permitting programs regulate only the pollution of surface waters from point sources, just as the Fourth Circuit's decision does. The Fourth Circuit's decision maintains the Act's limited scope, prohibiting unpermitted discharges from point sources to navigable waters. However, to exempt discharges that are not "directly into" navigable waters would gut these existing permitting programs, throwing the settled practice of agencies and industries into uncertainty.

Such a limitation would also undo still other permitting programs dealing with *surface* flows of pollution. When manure from a CAFO is sprayed on a field and runs off to nearby navigable waters, nothing exempts this discharge from the Clean Water Act merely because it is not channeled or confined continuously:

> [W]hether the land application run-off has been "collected" or "channelized" at the land application area is irrelevant to the determination regarding whether such run-off constitutes a CAFO discharge .... [A] CAFO is, itself, a "channel" under the Act—it is, of course, expressly included in the list of examples of the types of "point

[8] https://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=200047VF.TXT.

> sources" the EPA may regulate. Thus, any discharge "from" a CAFO is already a point source discharge. Requiring that manure, litter, or process wastewater be separately channelized at the land application site before any runoff could be considered a "point source discharge" would be, in effect, to impose a requirement not contemplated by the Act: that pollutants be channelized not once but twice before the EPA can regulate them.

Waterkeeper All., 399 F.3d at 510–11. Petitioners' argument that only discharges "directly into" navigable waters should be covered, if adopted on further review, would undo EPA's regulation of pollution from these overland CAFO discharges just as it would the regulation of pollution through groundwater. Far from supporting the existing regulatory scheme, Petitioners' argument would overturn it. The Court should decline Petitioners' invitation to do so.

II. Certiorari Is Not Warranted on Petitioners' Ongoing Discharge of Pollutants to Waters of the United States.

Because the Conservation Groups properly alleged Petitioners were "in violation" of the Clean Water Act, the Fourth Circuit correctly found subject matter jurisdiction over this citizen suit. 33 U.S.C. § 1365(a)(1). Indeed, if the Court reviewed the Fourth Circuit's decision and disagreed on this question, it would lack jurisdiction to decide the

discharge through groundwater question on which Petitioners focus.

The Fourth Circuit's decision, on unusual facts, that the Conservation Groups alleged an ongoing violation did not create a circuit split. Rather, its holding followed directly from the statutory language, this Court's holding in *Gwaltney*, and the facts of the case.

A. The Fourth Circuit's Holding Adheres to *Gwaltney* and the Statutory Text.

The Conservation Groups' complaint set out each element of Petitioners' ongoing violation of the Act's prohibition against the unpermitted "addition of any pollutant to navigable waters from any point source," 33 U.S.C. § 1362(12): the ongoing addition (through a short stretch of soil and groundwater) of a pollutant (petroleum) to navigable waters (creeks and wetlands) from a point source (Petitioners' pipe). Petitioners fail to identify a single element of the statutory definition of "discharge" that the Conservation Groups have not alleged.

Petitioners' question presented misunderstands the text and structure of the Clean Water Act. Petitioners did not violate the Act when their pipe broke; they violated the Act only when they added petroleum to the navigable waters from that pipe. Likewise, Petitioners did not stop adding pollutants to the waterway when they patched the pipe; they have not "permanently ceased discharging pollutants" when their "pollutants are still reaching navigable water through groundwater." Pet. at i. That addition of pollutants to the navigable waters is the unlawful discharge and the ongoing violation.

Petitioners' argument that the discharge stopped once it fixed the pipe has no basis in the text of the Act or *Gwaltney*. As the Fourth Circuit explained, Congress intended 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." App.17. Petitioners' theory would ignore the statutory text and apply the Act only to "immediate discharges," where pollutants are added from a point source to navigable waters instantaneously. But as the Sixth Circuit has explained, "temporally tying the 'addition' (or 'discharge') of the pollutant to the 'point source' does not follow the plain language of the Clean Water Act." *Nat'l Cotton Council of Am. v. EPA*, 553 F.3d 927, 939 (6th Cir. 2009). The court refused to "[i]nject[] a temporal requirement to the 'discharge of a pollutant'"; such a rewrite was "unsupported by the Act." *Id.*

Under the Clean Water Act's plain language, a break in a pipe is not a violation in itself. Indeed, if Petitioners prevented their spilled petroleum from entering navigable waters, there would be no unpermitted discharge even if the pipe had not been fixed. But the continuing addition of the pipe's pollutants to navigable waters does violate the Act, and repairing the pipe does not stop this violation.

Finding an ongoing discharge on the facts pled is faithful to *Gwaltney*. In *Gwaltney*, the polluter had stopped exceeding its permit limits weeks before plaintiffs filed suit and was no longer discharging "in violation of" its permit. 484 U.S. at 53–55. Here, Petitioners' continuing violation—their unpermitted

addition of pollutants to the waterway—is in no sense "wholly past," *id.* at 67, but is occurring today.

The decision below also heeds this Court's recognition in *Gwaltney* of the important but limited role citizen suits play in enforcing the Act. Citizen suits "permit[] citizens to abate pollution when the government cannot or will not command compliance." *Id.* at 62. Petitioners have never stopped the flow of petroleum to Browns Creek. South Carolina has not "command[ed] compliance" by compelling Petitioners to stop the addition of pollutants to the navigable water. *Id.* at 60. Accordingly, the Conservation Groups' action "supplement[s] rather than … supplant[s] governmental action." *Id.*

If Petitioners or South Carolina had stopped this addition of pollutants to navigable waters, the violation would have ceased. Petitioners would not have faced a Clean Water Act citizen suit, no matter how much they contaminated groundwater, because the Act does not protect groundwater. But because Petitioners continue to add pollutants to navigable waters, the plain text of the Act and this Court's precedent make clear that the ongoing discharge is a continuing violation subject to citizen enforcement.

B. There Is No Circuit Split.

Petitioners have cited no other Court of Appeals decision, including *Hamker v. Diamond Shamrock Chemical Co.*, that addresses ongoing pollution of navigable waters from a point source that has stopped emitting pollutants. 756 F.2d 392 (5th Cir. 1985). The Court should not address a question that has not divided the courts of appeals.

The Fourth Circuit's decision aligns with *Hamker*. Both decisions agree that citizen suits require a continuing violation, and a continuing violation requires an ongoing discharge to navigable waters. They differ on the facts. The plaintiffs in *Hamker* pled only that oil "is leaking into ground water and has left lasting damage to grasslands"—they did "not allege a continuing discharge" to navigable waters. *Id.* at 397. Here, as the Conservation Groups allege, Petitioners' massive petroleum spill produced a flow of pollutants discharging to the waterway that continues today. App.6–7. As the Fourth Circuit recognized when it found the two decisions consistent, the allegations crucially missing in *Hamker* are present here. App.17–18.

Likewise, in *Day, LLC v. Plantation Pipe Line Co.*, residents harmed by another recent Plantation Pipeline spill identified the "continued presence of petroleum" on their properties, but no continuing addition to navigable waters. 315 F. Supp. 3d 1219, 1236, 1236 (N.D. Ala. 2018). And like Petitioners' question presented, *Day* assumes "discharge" means the release of pollutants, not the "addition" to navigable waters as the Act defines it. *Id.* at 1239. Nor is this a case where leaks from long-abandoned facilities have migrated slowly or where there are only residual effects from events of years before. *See, e.g.*, *Aiello v. Town of Brookhaven*, 136 F. Supp. 2d 81, 85 (E.D.N.Y. 2001); *Wilson v. Amoco Corp.*, 33 F. Supp. 2d 969, 975 (D. Wyo. 1998); *Friends of Santa Fe Cty.*, 892 F. Supp. at 1359.

C. Whether Petitioners' Discharge of Pollutants to Navigable Waters Is

Ongoing Is a Fact-Bound Question of Limited Importance.

This decision is based on unusual factual circumstances—a spill large enough and close enough to the waterway that it continues discharging after the point source is patched—that are unworthy of this Court's review.

This ongoing discharge decision does not affect any permitting program for everyday industrial discharges or the Act's strict liability prohibition against unpermitted discharges. Petitioners say they are concerned about liability for inadvertent discharges for which they could not obtain a permit. Pet.35. But the fact that there is no Clean Water Act permitting program for spills or ruptured pipelines has no bearing on Petitioners' liability for continuing to pollute navigable waters.

Petitioners and their Petroleum Amici's difficulty stems not from the Fourth Circuit's holding but from the fact that the Clean Water Act applies to unintended discharges. In *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., Inc.*, 73 F.3d 546, 558–62 (5th Cir. 1996), the oil company argued it could not be held liable when EPA had not established a permitting program for its discharges. The court held: "Nothing in the [Act] 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." *Id.* at 561; *accord United States v. Ortiz*, 427 F.3d 1278, 1284 (10th Cir. 2005) (Act applies when no permit is available); *Ass'n to Protect Hammersley v. Taylor Res., Inc.*, 299 F.3d 1007,

1011–13 (9th Cir. 2002) (citizens may sue for unpermitted discharges when state agency has no applicable permit program).

Further review of this ongoing violation question will not change the strict liability standard to which Petitioners are subject. The only uncertainty for entities like Petitioners and their Petroleum Amici arises from pipeline spills themselves—not from the clear protections of the Clean Water Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Frank S. Holleman III
Counsel of Record
Nicholas S. Torrey
Leslie Griffith
SOUTHERN ENVIRONMENTAL LAW CENTER
601 West Rosemary Street, Suite 220
Chapel Hill, North Carolina 27516-2356
(919) 967-1450
fholleman@selcnc.org

Christopher K. DeScherer
SOUTHERN ENVIRONMENTAL LAW CENTER
463 King Street, Suite B
Charleston, South Carolina 29403
(843) 720-5270

October 23, 2018