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

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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.

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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,

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