

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 OF AMERICAN PETROLEUM
INSTITUTE, ASSOCIATION OF OIL PIPE
LINES, AND GPA MIDSTREAM ASSOCIATION
AS *AMICI CURIAE* IN SUPPORT OF THE
PETITION FOR CERTIORARI**

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INTEREST OF *AMICI CURIAE*¹

The American Petroleum Institute (“API”) is a nationwide, non-profit trade association that represents more than 625 companies involved in all aspects of the petroleum and natural gas industry, from the largest integrated companies to the smallest independent oil and gas producers. They are producers, refiners, suppliers, marketers, pipeline operators, and marine transporters, as well as service and supply companies that support the industry. API is also the worldwide leading standards-making body for the oil and natural gas industry.

The Association of Oil Pipe Lines (“AOPL”) is a nonprofit national trade association that represents the interests of liquid pipeline owners and operators before Congress, regulatory agencies, and the judiciary. AOPL’s members operate pipelines that extend approximately 212,500 miles across the United States. These pipelines safely, efficiently, and reliably deliver approximately 18.4 billion barrels of crude oil and petroleum products each year. AOPL strives to ensure that the public and all branches of government understand the benefits and advantages of transporting crude oil and petroleum

¹ Pursuant to this Court’s Rule 37, the American Petroleum Institute, Association of Oil Pipe Lines, and GPA Midstream Association state that all parties received timely notice of *amici*’s intent to file this brief and consented to this filing. Further, no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* funded its preparation or submission.

products by pipeline as the safest, most reliable, and most cost-effective method.

The GPA Midstream Association has served the U.S. energy industry since 1921 as an incorporated non-profit trade association. GPA Midstream is composed of close to 100 corporate members of all sizes that are engaged in the gathering and processing of natural gas into merchantable pipeline gas, commonly referred to in the industry as “midstream activities.” GPA Midstream members account for more than 90 percent of the natural gas liquid products (“NGLs”) produced in the United States from natural gas processing. GPA Midstream’s members also operate hundreds of thousands of miles of domestic gas gathering lines and are involved with storing, transporting, and marketing natural gas and NGLs.

Amici curiae support certiorari in this case for all of the reasons set forth in Kinder Morgan Energy Partners, L.P. and Plantation Pipe Line Company, Inc.’s petition for certiorari (“Petition”). *Amici* file this brief to highlight the national significance of the U.S. Court of Appeals for the Fourth Circuit’s decision regarding the reach of the Clean Water Act (“CWA”). This case asks whether a pipeline company may be subject to CWA permitting and liability for an accidental release from a product transmission pipeline into soil and groundwater if contaminants from that release eventually seep or migrate to navigable waters. If allowed to stand, the decision of the Fourth Circuit dramatically expands federal jurisdiction to include regulation of diffuse movements of pollutants in soil and groundwater that Congress explicitly reserved for state oversight.

The decision exposes pipeline and other petroleum facility operators to unprecedented and unworkable CWA obligations and liabilities, including potentially substantial penalties. Further, the Fourth Circuit's decision creates significant uncertainty for both industry and state permitting agencies regarding when a permit may be required and how such permits would be implemented.

INTRODUCTION AND SUMMARY OF ARGUMENT

Pipelines play a vital role in safely and reliably transporting significant volumes of petroleum products throughout the United States.² A network of more than 212,500 miles of liquid petroleum pipelines traversing the United States³ delivers hundreds of billions of ton/miles of liquid petroleum products each year.⁴ Petroleum provides nearly 40 percent of the United States' total energy consumption. *Id.* Not only do pipelines ensure that

² See Pipeline & Hazardous Materials Safety Admin., *General Pipeline FAQs*, <https://www.phmsa.dot.gov/faqs/general-pipeline-faqs> (last updated Feb. 14, 2018) (Pipelines enable “the safe movement of extraordinary quantities of energy products to industry and consumers, literally fueling our economy and way of life.”).

³ Am. Petroleum Inst. & Ass'n of Oil Pipe Lines, *2018 Annual Liquids Pipeline Report: Pipeline Safety Excellence Performance Report* 38, available at <http://www.aopl.org/wp-content/uploads/2018/04/2018-API-AOPL-Annual-Pipeline-Safety-Report-small.pdf>.

⁴ Pipeline & Hazardous Materials Safety Admin., *Pipeline Basics*, <https://primis.phmsa.dot.gov/comm/PipelineBasics.htm> (last visited Oct. 2, 2018).

energy is reliable, affordable, and delivered safely, they support millions of jobs directly and indirectly, deliver the raw materials that will be turned into life-saving products, and provide affordable basic utilities across the country. Pipelines are also a safe mode of energy transportation. 99.999 percent of crude oil and petroleum product barrels delivered by transmission pipeline reach their destination safely.⁵ For the rare “significant” pipeline incidents that occur,⁶ most are contained on operator-controlled property or are small in volume.⁷

A robust regulatory scheme exists to ensure pipeline safety and environmental protection. The safety, operations, and maintenance of liquid pipelines are regulated by the U.S. Department of

⁵ Pipeline & Hazardous Materials Safety Admin., *Pipeline Incident 20 Year Trends*, <https://www.phmsa.dot.gov/pipeline/library/data-stats/pipelineincidenttrends> (last updated Dec. 6, 2017).

⁶ “Significant” incidents are those when any of the following specifically defined consequences occur: fatality or injury requiring in-patient hospitalization; \$50,000 or more in total costs, measured in 1984 dollars; highly volatile liquid releases of five barrels or more or other liquid releases of 50 barrels or more; or liquid release resulting in an unintentional fire or explosion. Pipeline & Hazardous Materials Safety Admin., *Pipeline Incident Flagged Files*, <https://www.phmsa.dot.gov/pipeline/library/data-stats/flagged-data-files> (last updated July 5, 2018).

⁷ Am. Petroleum Inst. & Ass’n of Oil Pipe Lines, *2018 Annual Liquids Pipeline Report: Pipeline Safety Excellence Performance Report* 30-31, available at <http://www.aopl.org/wp-content/uploads/2018/04/2018-API-AOPL-Annual-Pipeline-Safety-Report-small.pdf>.

Transportation's Pipeline and Hazardous Materials Safety Administration ("PHMSA"), pursuant to its authorization under the Pipeline Safety Act, 49 U.S.C. § 60101 *et seq.* PHMSA's extensive safety regulations govern pipeline operations, including design, specifications, operation, and maintenance. PHMSA regulations, for example, dictate the design and material specifications for all segments of a pipeline, 49 C.F.R. § 195.200 *et seq.*, and the pressures at which such pipelines may be operated. 49 C.F.R. § 195.406. The regulations establish the frequency with which operators must conduct internal and external investigations to identify potential integrity threats, including timelines under which even potential threats must be inspected and repaired. 49 C.F.R. § 195.452. PHMSA regulations establish procedures for control of potential pipeline releases, including responding to alarms or triggers that may be indicative of a release, 49 C.F.R. § 195.446, and the placement of valves that may be remotely closed to minimize a release. 49 C.F.R. § 195.116. *Amici's* members are also subject to PHMSA's extensive emergency response planning requirements. *See* 33 U.S.C. § 1321. *Amici's* members prepare and implement comprehensive emergency response plan documents, which include hundreds of pages of detailed procedures to respond to a release from regulated facilities, including pipelines, storage tanks, and vessels. *See id.*

Pipelines are also subject to significant state safety requirements, which in some cases are more stringent than federal regulations. States may assume safety authority over intrastate pipelines through Certifications and Agreements with PHMSA under 49 U.S.C. §§ 60105-60106. The District of

Columbia, Puerto Rico, and all states except Alaska and Hawaii participate in the PHMSA pipeline safety program. This broad and pervasive federal and state regulatory regime helps protect against potential releases from petroleum and other liquid product pipelines.

When a release does occur, regulatory jurisdiction is divided between federal and state law. Congress established that federal jurisdiction under the CWA is limited to navigable waters, or “waters of the United States.” Groundwater is not “waters of the United States.” Thus, authority over releases into land or groundwater was explicitly reserved for the states. The CWA program at issue in this case, the National Pollutant Discharge Elimination System (“NPDES”) Program, prohibits the discharge of any pollutant from a point source to navigable waters without a permit. 33 U.S.C. §§ 1311(a), 1342(a)(1). Point sources are defined as “discernible, confined and discrete conveyance[s]” that discharge channeled or collected fluids to navigable waters. 33 U.S.C. § 1362(14). Nonpoint sources, by contrast, include diffuse migration of pollutants through seepage, runoff, and atmospheric deposition.⁸ Operators who discharge pollutants from a point source into waters of the United States must obtain a permit through the NPDES program, administered by the U.S. Environmental Protection Agency (“EPA”) or states with delegated authority.

⁸ See U.S. EPA, *Basic Information about Nonpoint Source (NPS) Pollution*, <https://www.epa.gov/nps/basic-information-about-nonpoint-source-nps-pollution> (last visited Oct. 2, 2018).

When pollutants reach navigable waters by means other than a discernible, confined, and discrete conveyance, as is the case here, there is no discharge of a pollutant subject to NPDES requirements. Instead, the CWA leaves it to the states to regulate such diffuse movements of pollutants. See 33 U.S.C. § 1314(f) (directing EPA to provide information to the states to aid in the control of nonpoint source pollution). Congress understood that both point source and nonpoint source pollution could impact water quality but stated explicitly that federal jurisdiction applied only to point sources that discharge to navigable waters. In the present case, NPDES requirements were not triggered because there was no discharge from a point source to navigable waters. Instead, the accidental release, which occurred in soil and groundwater, was subject to the authority and oversight of the South Carolina Department of Health and Environmental Control (“DHEC”). See *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 644 (4th Cir. 2018) (explaining the extensive remediation and recovery measures undertaken under the guidance of DHEC).

The Fourth Circuit abandoned decades of consistent interpretation of the distinction between point and nonpoint source pollution when it held that a discharge of a pollutant “need not be channeled by a point source until it reaches navigable waters” in order to be subject to NPDES requirements. *Upstate Forever*, 887 F.3d at 651. According to the Fourth Circuit’s interpretation, diffuse movement of pollutants that were released years ago by a pipeline into land and groundwater now qualify as a point source discharge under the CWA as long as there is a

“direct hydrological connection” between the groundwater the pollutants migrated into and the navigable waters the pollutants eventually reached. *Id.* at 651-52. This decision disrupts the careful scheme Congress created under the Clean Water Act and dramatically expands the Federal Government’s jurisdiction to reach nonpoint source pollution. Moreover, the Fourth Circuit’s overbroad reading was recently rejected in two Sixth Circuit opinions, which found *Upstate Forever’s* “direct hydrological connection” test without support “in either the text or the history of the CWA and related environmental laws.” See *Tenn. Clean Water Network v. Tenn. Valley Auth.*, No. 17-6155, slip op. at 2-3, 14 (6th Cir. Sept. 24, 2018); *Ky. Waterways All. v. Ky. Utils. Co.*, No. 18-5115, slip op. at 9-10 (6th Cir. Sept. 24, 2018).

The fact that NPDES requirements do not apply to the types of discharges at issue here can be illustrated by examining the permitting program itself. Petroleum product pipelines, like the pipeline at issue in this case, transport valuable products. They do not convey waste like outfall pipes or other facilities that may be subject to NPDES permitting. The NPDES program is intended for intentional discharges to waters of the U.S., not accidental and temporary releases on land that may eventually make their way to waters of the U.S. In the rare occurrence of a pipeline release, even assuming one were able to identify the various points from which migrating pollutants reach navigable waters, access to conduct treatment, sampling, or monitoring would be highly impracticable, if not impossible. The NPDES program’s purpose is to address “end of pipe” waste discharges to navigable waters—it simply was not designed to regulate the type of spill seepage and

diffuse migration at issue in this case. Under the Fourth Circuit's holding, an NPDES permit could be required any time product is accidentally released from a pipeline or other source and migrates through groundwater or soil to navigable waters, as long as the nebulous "direct hydrological connection" standard is satisfied. NPDES requirements could apply no matter how diffuse that migration is and no matter how many days, weeks, months, or even years that migration takes. Such a broad interpretation of CWA liability impermissibly expands the scope of the NPDES program to nonpoint sources and makes the program unworkable.

ARGUMENT

I. THE FOURTH CIRCUIT'S INTERPRETATION OF NPDES LIABILITY IMPERMISSIBLY EXPANDS THE SCOPE OF THE CWA

The CWA prohibits the "discharge of any pollutant" to a navigable water without an NPDES permit. 33 U.S.C. §§ 1311(a), 1342(a)(1). "Discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12)(A). The Act therefore establishes two critical limitations on federal jurisdiction under the NPDES program—such permits are required only for discharges 1) from point sources, 2) to navigable waters. The CWA thus draws a "clear and precise distinction between point sources, which [are] subject to direct Federal regulation, and nonpoint sources, control of which was specifically reserved to State and local governments." *See* S. Rep. No. 95-370, at 8 (1977).

The Fourth Circuit has unraveled this careful distinction by holding that a point source need not convey the pollutants to navigable waters in order to trigger NPDES liability. The Fourth Circuit found that “a point source is the starting point or cause of a discharge under the CWA, but that starting point need not also convey the discharge directly to navigable waters.” *Upstate Forever*, 887 F.3d at 650.

The Fourth Circuit further blurred the Act’s jurisdictional line by holding that pollutants transported via groundwater that has a “direct hydrological connection” to surface waters of the United States violate the CWA. *Id.* at 650-51. However, the CWA prohibits discharges to navigable waters, not to any waters with a “direct hydrological connection” to navigable waters. This new test not only re-writes the statute but is contrary to decades of case law interpreting the Act. As discussed in the Petition, the weight of authority has held that discharges to groundwater are not regulated under the CWA even if the groundwater is hydrologically connected to waters of the United States. See Petition 16-19 (explaining that, until this decision by the Fourth Circuit and a recent Ninth Circuit decision, *Hawai’i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737, 749 (9th Cir. 2018), “no circuit had ever construed the CWA to apply to discharges into soil or groundwater”). Moreover, the Sixth Circuit has since explicitly rejected the “hydrological connection theory” as having no support “in either the text or the history of the CWA and related environmental laws,” thereby solidifying the circuit split. *Tenn. Clean Water Network*, slip op. at 2-3; see *Ky. Waterways All.*, No. 18-5115.

Diffuse migration of a pollutant to a navigable water—whether through groundwater or seepage through soil—does not constitute an addition of a pollutant to a navigable water *from a point source*. As the *Upstate Forever* dissent recognized, “Ongoing migration from a site contaminated by a past discharge does not involve a point source and is thus not a cognizable violation under the CWA.” 887 F.3d at 661 (Floyd, J., dissenting). The mere fact that a pollutant eventually finds its way to a navigable water is insufficient to constitute a covered discharge because the term “discharge of a pollutant” requires that the “point source” itself be the actual or direct conveyance from which the pollutant is added to navigable waters. See *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004) (explaining that a point source must *convey* the pollutant to navigable waters).

Furthermore, the “hydrological connection” interpretation conflicts with the core of EPA’s regulatory power under the NPDES program—setting “effluent limitations,” which the CWA defines as “restrictions on the amount of pollutants that may be ‘discharged from point sources *into* navigable waters.” *Ky. Waterways All.*, slip op. at 11-12 (quoting 33 U.S.C. § 1362(11)). The word “into” “refers to a point of *entry*,” and therefore, “for a point source to discharge *into* navigable waters, it must dump *directly* into those navigable waters—the phrase ‘into’ leaves no room for intermediary mediums to carry the pollutants.” *Id.* at 12.

In a more recent opinion, despite continuing to adhere to the “hydrological connection” interpretation of liability, the Fourth Circuit

acknowledged that CWA liability requires a discrete conveyance into navigable waters. *See Sierra Club v. Va. Elec. & Power Co.*, No. 17-1895 (4th Cir. Sept. 12, 2018). In *Sierra Club*, the plaintiffs alleged that arsenic from coal ash stored in landfills and settling ponds was leaching into groundwater and then migrating to navigable waters. *Sierra Club*, slip op. at 15. The Fourth Circuit found that the coal ash storage facilities were not “point sources” under the CWA because they were not *conveying* the arsenic to navigable waters. *Id.* The court explained that “the actual means of conveyance of the arsenic was the rainwater and groundwater flowing *diffusely* through the soil.” *Id.*

Similarly, in the instant case, CWA liability was not triggered because there was no discrete mechanism conveying pollutants to navigable waters. The initial release from the pipeline was into land and groundwater, and therefore was not covered by the CWA because it was not a discharge “to navigable waters.” *See* 33 U.S.C. § 1362(12). And the eventual migration of the contaminants from the spill site to the navigable waters was outside the scope of the CWA because the contaminants were not conveyed by a “point source”—instead, they were conveyed by diffuse movements through soil and groundwater. *See id.* Under the logic of *Sierra Club*, because the pipeline did not convey the pollutants to the navigable water, no CWA violation occurred.

Contrary to the Fourth Circuit’s holding in *Upstate Forever*, NPDES requirements cannot apply merely because pollutants ultimately reach navigable waters through “hydrologically connected” groundwater. As the Sixth Circuit recognized, the

migration of pollutants via groundwater to navigable waters “is a nonpoint-source conveyance.” *Ky. Waterways All.*, slip op. at 12; *Tenn. Clean Water Network*, slip op. at 11. Holding otherwise renders meaningless Congress’s “clear and precise” distinction between point and nonpoint sources. See S. Rep. No. 95-370, at 8 (1977). NPDES requirements apply only when the point source is the actual and direct means by which the pollutant is added to a navigable water. See *Trs. for Alaska v. Env’t Prot. Agency*, 749 F.2d 549, 558 (9th Cir. 1984) (“[P]oint and nonpoint sources are not distinguished by the kind of pollution they create or by the activity causing the pollution, but rather by whether the pollution reaches the water through a confined, discrete conveyance.”).

Any other reading of the CWA would eliminate all meaningful differentiation between the terms “point source” and “nonpoint source,” as nearly all nonpoint source pollution can be traced back to some discrete conveyance. The Fourth Circuit’s overbroad interpretation would result in the imposition of NPDES requirements on “paradigmatic examples of nonpoint source pollution” such as runoff, “whether channeled or not.” *Simsbury-Avon Pres. Soc’y v. Metacon Gun Club, Inc.*, 575 F.3d 199, 224 (2d Cir. 2009); see *Upstate Forever*, 887 F.3d at 662 (Floyd, J., dissenting) (“As the record plainly shows, groundwater is carrying gasoline from the spill site, which spans in three different directions from the pipeline and covers a vast area This kind of migration of pollutants through the natural movements of groundwater amounts to nonpoint source pollution.”). An interpretation of the CWA that turns solely on whether the release of pollutants

from a point source eventually reaches a navigable water through groundwater seepage or other dispersed means “would eviscerate the point source requirement and undo Congress’s choice” to exclude things like diffuse runoff from the NPDES program. *Simsbury-Avon Pres. Soc’y*, 575 F.3d at 224.

EPA’s guidance on the distinction between point and nonpoint sources provides additional evidence that diffuse migration of pollutants is not subject to the NPDES program. *See, e.g.*, U.S. EPA, *Basic Information about Nonpoint Source (NPS) Pollution*, <https://www.epa.gov/nps/basic-information-about-nonpoint-source-nps-pollution> (last visited Oct. 2, 2018) (“NPS pollution generally results from land runoff, precipitation, atmospheric deposition, drainage, seepage or hydrologic modification.”); *see also Simsbury-Avon Pres. Soc’y*, 575 F.3d at 220-21 (quoting comparable descriptions of nonpoint source pollution from EPA guidance documents). EPA recognizes that a critical distinction between point sources and nonpoint sources is how pollutants reach navigable waters. That recognition cannot be squared with the Fourth Circuit’s decision. This Court should grant the Petition in order to resolve the circuit split and overrule the Fourth Circuit’s over-expansive interpretation of point source discharges.

II. THE FOURTH CIRCUIT’S EXPANSIVE INTERPRETATION OF NPDES LIABILITY IS UNWORKABLE

Review of the Fourth Circuit’s decision is also warranted because it will lead to impracticable and unworkable results. *See Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982) (“Statutes should

be interpreted to avoid untenable distinctions and unreasonable results whenever possible.”); *see also Ky. Waterways All.*, slip op. at 16 (“Reading the CWA to cover groundwater pollution like that at issue in this case would upend the existing regulatory framework.”).

Under the Fourth Circuit’s decision in this case, much of what EPA and the courts have long considered to be nonpoint source pollution would now be included in the NPDES program. While this case involves a product transmission pipeline, the breadth of the court’s interpretation would extend to any source of contamination that could potentially reach navigable water, including spills from other forms of transportation such as rail or trucks, or leaks from storage tanks or septic systems. Indeed, there appears to be no meaningful limit to the number of sources that could require permits under the Fourth Circuit’s broad interpretation of the statute. Because all that is required under the court’s decision to trigger NPDES liability is the eventual migration of a pollutant to groundwater with a “direct hydrological connection” to navigable waters, 887 F.3d at 651, hundreds of thousands of additional NPDES permits could potentially be required nationwide. Congress could not have intended such a wide-reaching result when it drew sharp and meaningful distinctions between point and nonpoint source pollution control and reserved authority over nonpoint discharges for state and local governments. *See Ky. Waterways All.*, slip op. at 15 (explaining that “fostering cooperative federalism” is a purpose of the CWA).

The fact that NPDES requirements do not apply to the type of releases at issue in this case is further illustrated by the objectives and mechanics of the NPDES permit program. The NPDES program is not a spill response program. It does not contain comprehensive cleanup, disposal, or response provisions that are triggered in the event of a product spill, such as those in the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. § 9601 *et seq.*, the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6901 *et seq.*, or the Oil Pollution Act, 33 U.S.C. § 2701 *et seq.*

Instead, the NPDES program is an “end of pipe” or “outfall” permit program under which specific effluent limits and monitoring requirements are established prior to direct discharges to waters of the U.S. When a facility is planning operations that will involve a discharge to waters of the U.S., the facility must apply for an NPDES permit before such operations begin. The EPA or state permit writer then sets effluent limits based on the nature of the discharge and the water quality of the specific receiving water. Thus, NPDES permit applications require a precise outfall description and location. 40 C.F.R. § 122.21(j)(3)(i)(A-F). If granted, the permit contains numeric effluent limitations and monitoring requirements and other conditions specific to the water quality of the receiving water body. *See id.* § 122.21(j)(4)(i).

The potential migration of pollutants from an accidental pipeline leak that has since been repaired does not fit within the NPDES permitting requirements because such migration is diffuse and

unfixed, rather than a defined outfall. NPDES permitting is unworkable in this setting because the migration of contaminants from the spill site cannot be properly predicted, identified, monitored, or regulated. See *Upstate Forever*, 887 F.3d at 657 (Floyd, J., dissenting) (explaining that, for nonpoint source pollution, “it would be difficult to mandate compliance with inspection, reporting, and monitoring requirements [of the NPDES program] given that nonpoint source pollution cannot be traced to discrete sources.”). For pollutants that migrate diffusely from a particular area via groundwater or soil, it may not be possible to pinpoint the ultimate connection to a navigable water. Thus, there are no readily identifiable outfalls or discharge points that can be used for purposes of calculating effluent limitations and conducting the required sampling and monitoring under the NPDES program. See 40 C.F.R. Part 122 Subpart C.

Even if a “direct hydrological connection” with navigable waters could be identified in a given situation, migration within the soil and groundwater is ephemeral and changes depending on hydrologic, geologic, and even seasonal conditions. Permitting such a diffuse source would be unworkable. See *Sierra Club*, slip op. at 15-16 (stating that, “[i]n regulating discharges of pollutants from point sources, Congress clearly intended to target the *measurable* discharge of pollutants,” and explaining that the NPDES program’s enforcement scheme relies on applying precise “effluent limitation[s]” to “discrete outfalls”). As the Fourth Circuit more recently explained, “When a source works affirmatively to *convey* a pollutant, the concentration of the pollutant and the rate at which it is discharged

by that conveyance *can be measured*. But when the alleged discharge is diffuse and not the product of a discrete conveyance, that task is virtually impossible.”⁹ *Id.* at 16. While the Fourth Circuit in *Upstate Forever* held that the pipeline operator could be found liable for failing to obtain NPDES permits for the migration of contaminants from a spill site, the reality is that they likely could not have obtained such permits even if they tried.

Furthermore, NPDES permits are issued to the owner or operator of a facility for discharges from that facility to a navigable water. Thus, NPDES permits are premised on the assumption that the permit holder controls the discharge and has access to the discharge site for monitoring. This assumption does not hold for spill sites or underground seepage downgradient from such sites. Even assuming a connection between the diffuse migration and a navigable water could be identified, it may not be possible for the owner or operator of the facility from which the spill occurred to conduct the required sampling and monitoring because the location may be miles away and beyond the owner or operator’s control. In short, it would be impracticable, if not impossible, to apply NPDES requirements to the types of diffuse releases at issue in this case.

⁹ While the *Sierra Club* decision helps explain why the NPDES program cannot apply to diffuse conveyances, the Fourth Circuit in *Sierra Club* explicitly affirmed the hydrological connection holding of *Upstate Forever*. *Sierra Club*, slip op. at 11-12.

The Fourth Circuit’s “direct hydrological connection” standard of liability thus creates significant uncertainty for owners and operators of pipeline industry facilities and for regulators. Hydrology is complex, and the hydrological “connectedness” of a particular area of groundwater to other bodies of water is not always known or easily ascertained. Entities frequently will not know in advance if their particular activity could lead to a release that could contaminate groundwater which in turn might be found to have a “direct hydrological connection” to navigable waters. Under the Fourth Circuit’s ruling, countless entities are faced with a decision of whether they should go through the considerable expense of applying for an NPDES permit or remain potentially exposed to liability under the CWA.

The consequences are significant either way—if a permit is not obtained, and a court uses the Fourth Circuit test to impose liability, the facility faces potential civil penalties of up to \$53,484 per day. 40 C.F.R. § 19.4 tbl.2. On the other hand, obtaining an NPDES permit in itself is an expensive and time-consuming process even for discharges where federal jurisdiction is clear and well-precedented. *See U.S. Army Corps of Eng’rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1812 (2016) (discussing a study’s findings that an individual NPDES permit costs, on average, \$271,596 to complete).

The uncertainty created by the Fourth Circuit’s decision also impacts state permitting agencies, which will be called upon to make permitting decisions regarding releases to groundwater with which they have never before had to grapple.

Whether state permitting agencies will be willing or able to shoehorn such diffuse releases into a permitting program designed for discrete discharges to jurisdictional waters is far from clear. Supreme Court review is vital to ensure that entities like petroleum pipeline operators are not forced to choose between attempting to obtain costly and cumbersome federal NPDES permits or risking substantial penalties—all for releases that Congress did not intend to be subject to federal regulation under the CWA.

CONCLUSION

For the foregoing reasons, and those stated by
Petitioners, the Petition should be granted.

Respectfully submitted,

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