

No. 18-260

In the
Supreme Court of the United States

COUNTY OF MAUI,

Petitioner,

v.

HAWAII WILDLIFE FUND, et al.,

Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

**BRIEF FOR *AMICI CURIAE* KINDER
MORGAN ENERGY PARTNERS, L.P. AND
PLANTATION PIPE LINE COMPANY, INC.
IN SUPPORT OF PETITIONER**

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
C. HARKER RHODES IV
LAUREN N. BEEBE
KIRKLAND & ELLIS LLP
1301 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

Counsel for Amici Curiae

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CORPORATE DISCLOSURE STATEMENT

Kindert 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.

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STATEMENT OF INTEREST¹

Amici are energy infrastructure companies with a unique and substantial interest in the question presented in this case. Indeed, *amici* have a pending petition for certiorari (No. 18-268) raising the same issue presented here and which was subject to a joint invitation for the views of the Solicitor General. *See* Order List (filed Dec. 3, 2018).

Kinder Morgan Energy Partners, L.P., is a leading North American pipeline transportation and energy storage company. Together with its corporate parents and affiliates, it owns an interest in or operates approximately 84,000 miles of pipelines that transport natural gas, gasoline, crude oil, carbon dioxide, and other products, and 157 terminals that store and handle petroleum products and other chemicals. Plantation Pipe Line Company, Inc., operates one of the largest pipelines for refined petroleum products in the United States; its pipeline network runs for approximately 3,180 miles from Louisiana to Washington D.C., serving metropolitan areas that include Birmingham, Alabama; Atlanta, Georgia; and Charlotte, North Carolina. *Amici* thus have a significant general interest in issues of federal and state regulation that affect the energy infrastructure industry.

¹ Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties have consented to this filing in letters on file with the Clerk's office.

As noted, however, *amici* have a particular interest in the issues raised here because they are the petitioners in *Kinder Morgan Energy Partners, L.P. v. Upstate Forever*, No. 18-268 (U.S. filed Aug. 28, 2018), a pending petition that presents closely related questions about the scope of the Clean Water Act (“CWA”) as applied to discharges into soil and groundwater. In that case, an underground pipeline operated by *amici* developed a crack that leaked gasoline and diesel into the surrounding soil and groundwater. *Amici* fully repaired the leak within a few days of discovering it and began extensive remediation efforts under state supervision. Years later, however, two environmental advocacy groups sued *amici* under the CWA citizen-suit provision. They alleged that the accidental discharge from the pipeline into soil and groundwater violated the CWA because that soil and groundwater were hydrologically connected to nearby navigable waters; and they claimed that this alleged violation was continuing, even though the pipeline had been fully repaired years earlier, because despite *amici*’s remediation efforts some pollutants from the spill allegedly continued to seep into nearby tributaries and wetlands.

The district court dismissed the complaint, holding that the plaintiffs had failed to state any CWA violation, let alone a continuing violation. But a divided panel of the Fourth Circuit reversed, holding that the CWA covers any discharge into groundwater with a “direct hydrological connection” to navigable waters, and that a CWA violation continues as long as pollutants from the spill are still reaching navigable waters. *See Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018). The

pending *Kinder Morgan* petition seeks review of those interrelated holdings. Because the resolution of those questions turns on this Court's interpretation of the scope of the CWA, *amici* have an obvious and substantial interest in the issues presented in this case.

SUMMARY OF ARGUMENT

The CWA 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 specific type of pollution released into 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) (emphasis added). For other forms of pollution, including diffuse contamination of the soil and groundwater, Congress made a deliberate judgment, informed by the nature of our federal system, to leave the States with primary responsibility to develop appropriate regulatory programs tailored to local conditions.

The statutory text, structure, and history all confirm that the CWA applies only to discharges from a point source into navigable waters, not discharges (or seepages) into soil or groundwater that eventually filter into navigable waters. As a textual matter, the statute covers only the addition of pollutants to "navigable waters," not soil or water seeping through that soil deep underground. And a number of provisions of the CWA explicitly distinguish between navigable waters and groundwater, making it even more implausible to suggest that authority over the former included authority over the latter. Reading the

statute to reach discharges into groundwater that eventually pass into navigable waters would erase the statutory distinction between those two concepts, as well as the equally critical statutory distinction between point-source and nonpoint-source pollution.

The history of the statute reinforces that Congress consciously refrained from regulating discharges into groundwater, choosing instead to preserve traditional state authority over soil and groundwater pollution. The usefulness of regulatory authority over groundwater in regulating navigable waters was not lost on the EPA when Congress was debating the CWA. The then-Administrator made a plea for broad authority over groundwater and was rebuffed by a Congress disinclined to pursue the ends of the CWA at the expense of basic principles of federalism. Since that time, the agency responsible for enforcing the statute has generally taken the same view, interpreting the statute to categorically exclude discharges into groundwater from its scope. And this Court has already squarely rejected the broad-brush approach to the CWA adopted by the Ninth Circuit below and by the Fourth Circuit in *Upstate Forever*, holding that Congress never meant for the CWA to reach any and all water that happens to have some hydrological connection to navigable waters. In short, the traditional sources of statutory interpretation uniformly demonstrate that the CWA covers only discharges from a point source into navigable waters, not soil and groundwater pollution.

That reading is further confirmed by considerations both foundational and practical. Soil and groundwater are not some jurisdictional no-man's

land between pollution and navigable waters. Instead, soil and groundwater are undoubted subjects of traditional state and local regulation from time immemorial. Thus, from a constitutional perspective there is a world of difference between federal regulation of navigable waters, and federal regulation of soil and groundwater. State and local authority over soil and groundwater is not just a matter of constitutional theory. Numerous state and local regulatory regimes (and even some federal ones) already address soil and groundwater pollution, making it unnecessary (and counterproductive) to extend the CWA into that area. Still worse, the atextual standards that the Fourth and Ninth Circuits have proposed would create massive regulatory confusion, aggravating the problems with this “notoriously unclear” statute whose broad and ill-defined scope has long proven to be “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).

Distorting the CWA to reach discharges into groundwater also leads to incongruous results, such as the holdings in *Upstate Forever* and other cases that a private plaintiff can allege an “ongoing violation” of the CWA (and so can take advantage of the statute’s citizen-suit provision) whenever some lingering contamination is still seeping through groundwater into navigable waters, even when the actual discharge at issue ceased years ago. That problem has nothing to do with Article III jurisdiction, *see Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 91 (1998), and everything to do with severing the link between the discharge necessary for the statute to apply and

navigable waters covered by the CWA. And it creates intractable practical problems as well, for the most common circumstances in which the “hydrological connection” theory has been employed (such as leaks or coal ash ponds) do not involve any discharge at all, but rather involve only the gradual migration or seepage of pollutants into groundwater that ultimately find their way to navigable waters. There is no feasible way to “permit” the continuing migration through groundwater of pollutants from a long-ago-ceased pipeline leak, or the diffuse seepage into soil of pollutants at the bottom of an ash pond. Proving the point, the remedy plaintiffs have sought in such cases is not for the defendant to get the permit that they have been sued for failing to obtain, but for a federal court to wrest regulatory and remedial control from the States.

In short, extending the CWA permitting regime to a context for which it plainly was not designed will create nothing but frustration and confusion for regulators, regulated entities, and courts. This Court should reject that impractical and statutorily unsupported approach, reverse the decision below, and restore the CWA to its intended scope.

ARGUMENT

I. The CWA Does Not Apply To Discharges Into Soil Or Groundwater.

A. Statutory Background.

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 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 of navigable waters, which are a classic—indeed, the classic—channel of interstate commerce.

1. The CWA prohibits “the discharge of any pollutant by any person,” except as otherwise permitted by the Act. 33 U.S.C. §1311. Such a “discharge of any pollutant” is the basic concept that triggers the CWA’s coverage and the possibility of obtaining a permit. Not surprisingly, the Act specifically defines that phrase 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). 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, in accordance with the States' traditional primacy over local land regulation and with Congress' understanding that soil and groundwater pollution would be better supervised at the local level. *See, e.g.*, Interpretive Statement on Application of the Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants from a Point Source to Groundwater, 84 Fed. Reg. 16,810, 16,813 (Apr. 23, 2019) (recognizing Congress' "intent to leave the regulation of groundwater wholly to the states").

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); 84 Fed. Reg. at 16,813 (explaining that "Congress reserved to states their exclusive role in regulating nonpoint source pollution"). All 50 States have adopted such programs. *See State Contacts for*

Nonpoint Source (NPS) Pollution Programs, EPA, <https://bit.ly/2GRKkLK> (last visited May 16, 2019).

2. 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).

B. The Text, Structure, and History of the CWA All Confirm That the Statute Does Not Regulate Soil or Groundwater Pollution.

This case presents a simple question of statutory interpretation: whether the federal regulatory scheme established by the CWA applies only to discharges into navigable waters, or also extends to discharges into soil or groundwater that eventually find their way into navigable waters. That question has an equally simple answer, as the text, structure, and history of the CWA all confirm that the statute reaches only the former and not the latter.

1. The statutory analysis “begin[s], as always, with the text.” *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (2017). In this case, the statutory text is straightforward: 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 falls outside the scope of the CWA because neither soil nor groundwater constitutes “navigable waters.”

As noted above, 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) (alterations omitted). While “waters of the United States” may encompass some features that would not be conventionally described as “navigable”—such as permanent wetlands abutting rivers or lakes, *see id.* at 734-35—it most certainly does not encompass soil or water seeping through that 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”); 84 Fed. Reg. at 16,814-15 (analyzing relevant statutory provisions).

That exclusion is telling, as several provisions of the CWA 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); *see also* 84 Fed. Reg. 16,816-17 (discussing CWA provisions that address groundwater). That textual distinction makes it unsurprising that numerous courts have recognized that the CWA does not “assert[] authority over ground waters,” whether or not they are “hydrologically connected with surface waters.” *Vill. of Oconomowoc Lake v. Dayton Hudson Corp.* 24 F.3d 962, 965 (7th Cir. 1994); *see also, e.g., Rice v. Harken Expl. Co.*, 250 F.3d 264, 272 (5th Cir. 2001) (noting “Congress’s decision to leave the regulation of groundwater to the States”); *Exxon Corp. v. Train*, 554 F.2d 1310, 1324 (5th Cir. 1977) (explaining that “Congress meant to stop short of establishing federal controls over groundwater pollution” and allow the States to “retain[] control of their own groundwater pollution control programs”).

2. The statutory structure reinforces that conclusion. Reading the CWA to cover the seepage of pollutants through soil and groundwater would not only erase the line that the CWA draws between navigable waters and groundwater, but would also disrupt the statute’s fundamental and federalism-preserving distinction between point- and nonpoint-source pollution.

Congress carefully confined the CWA’s permitting scheme to discharges “from any point source,” defined as a “discernible, confined and discrete conveyance” like a pipe or tunnel, as opposed to nonpoint sources like rainwater runoff from roads or diffuse underground seepage. 33 U.S.C. §1362(12), (14). Like the distinction between groundwater and navigable waters, the distinction between point and nonpoint

sources pervades 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. *See Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 550 F.3d 778, 780 (9th Cir. 2008) (recognizing the CWA's "disparate treatment of discharges from point sources and nonpoint sources" as an "organizational paradigm of the Act"). 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"); 84 Fed. Reg. at 16,813 (recognizing that the CWA "reserved to states their exclusive role in regulating nonpoint source pollution").

Treating discharges into soil or groundwater that then seep into navigable waters as point-source pollution would eliminate that critical distinction. 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

numerous courts have recognized that “the CWA’s text forecloses an argument that groundwater is a point source.” *Ky. Waterways All. v. Ky. Utils. Co.*, 905 F.3d 925, 933 (6th Cir. 2018); *see also, e.g., Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1140 n.4 (2005) (“[g]roundwater seepage” is “nonpoint source pollution, which is not subject to NPDES permitting”); *Tri-Realty Co. v. Ursinus College*, 124 F. Supp. 3d 418, 472 (E.D. Pa. 2015) (“diffuse groundwater migration is not point source pollution”). Reading the CWA to reach discharges that are later carried by groundwater into navigable waters would collapse the distinction between point-source and nonpoint-source pollution, upending the carefully calibrated division of federal and state authority that Congress designed.

3. The history of the CWA likewise reinforces that Congress never intended this statute to regulate groundwater pollution. 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 specifically *rejected* proposals to extend federal authority under the CWA to reach discharges into groundwater.

For instance, then-EPA-Administrator William Ruckelshaus specifically requested statutory authority to regulate discharges into groundwater in order to better regulate the quality of navigable waters 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). Individual legislators took the same view, suggesting that Congress should authorize “Federally approved standards for groundwaters which permeate rock[,] soil, and other subsurface formations,” S. Rep. No. 92-414, at 73 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3739; *see also* 118 Cong. Rec. 10,666 (1972) (proposal to extend NPDES permitting to groundwater because “ground water gets into navigable waters”). But while Congress recognized the connections between groundwater and surface-water pollution, it repeatedly rejected those requests, finding regulation of groundwater pollution a matter better left to the States. S. Rep. No. 92-414, at 73, *reprinted in* 1972 U.S.C.C.A.N. at 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]”); 84 Fed. Reg. at 16,815-16 (discussing relevant history).*

Those proposals were rejected not because anyone disputed the premise that jurisdiction over groundwater would be useful in regulating navigable waters, but because our federalist structure elevates some values above regulatory efficiency, and Congress consciously preserved our federalist system in the CWA. 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; *see Oconomowoc Lake*, 24 F.3d at 965. 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 every discharge that finds its way to navigable waters, including discharges directly into soil and groundwater, might well be the most efficient regime for preserving the quality of navigable waters, but it would also 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) (alterations omitted) (quoting *SWANCC*, 531 U.S. at 174). Congress undoubtedly cared about promoting water quality but manifestly did not intend to effect such an “unprecedented intrusion into traditional state authority.” *Id.* at 738.

4. That understanding of the text, structure, and history of the CWA has been adopted not only by numerous judicial opinions interpreting the CWA, *see, e.g., Tenn. Clean Water Network v. TVA*, 905 F.3d 436, 442-46 (6th Cir. 2018); *Ky. Waterways*, 905 F.3d at 932-38; *Rice*, 250 F.3d at 268-72; *Oconomowoc Lake*, 24 F.3d at 964-66; *Exxon Corp.*, 554 F.2d at 1318-31, but (albeit after some equivocation) by the agency responsible for enforcing the statute. In April 2019, after providing notice and an opportunity for comment, EPA issued an interpretive statement explaining its view that the CWA “is best read as excluding all releases of pollutants from a point source to groundwater from NPDES program coverage, regardless of a hydrologic connection between the groundwater and jurisdictional surface water.” 84

Fed. Reg. at 16,810. The agency reached that conclusion—intended to definitively resolve its own “mixed record” on the issue—after conducting a “holistic analysis of the statute, its text, structure, and legislative history,” informed by “over 50,000 comments ... from a wide audience representing state governments, local governments, tribes, industry, environmental organizations, academia, and private citizens.” *Id.* at 16,810-11. Based on its own analysis and its review of the numerous comments it received, the agency concluded that interpreting the CWA to exclude discharges into groundwater from the scope of the NPDES program was “the best, if not the only, reading of the CWA” and “more consistent with Congress’s intent than other interpretations of the Act.” *Id.* at 16,811.

In reaching that conclusion, EPA specifically considered and disagreed with the reasoning of the Ninth Circuit’s decision below and the Fourth Circuit’s decision in *Upstate Forever*. As EPA explained, those decisions “expand the Act’s coverage beyond what Congress envisioned,” “contravene Congress’s intent to leave regulation of all releases of pollutants to groundwater to states,” and “stretch the Act’s carefully constructed program ... beyond a point that Congress would recognize.” *Id.* at 16,823. Instead, the text, structure, and history of the CWA demonstrate that Congress “intentionally chose to exclude *all* releases of pollutants to groundwater from the NPDES program, even where pollutants are conveyed to jurisdictional surface waters via groundwater.” *Id.* at 16,811. That careful analysis by the agency that Congress tasked with interpreting and enforcing the CWA further confirms that the

statute cannot and should not be read to regulate discharges into groundwater.

C. This Court's Precedent Likewise Confirms That the CWA Does Not Reach Discharges Into Soil and Groundwater.

Both the Ninth Circuit panel below and the divided Fourth Circuit panel in *Upstate Forever* sought support from this Court's decision in *Rapanos*, suggesting that the plurality opinion there endorses the view that the CWA reaches discharges into soil or groundwater that eventually seep into nearby navigable waters. See Pet.App.21-22; *Upstate Forever*, 887 F.3d 649-50. That suggestion is sorely mistaken.

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." 547 U.S. 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 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 further 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 initial 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.*; see *Ky. Waterways*, 905 F.3d at 936 (*Rapanos* plurality “explain[ed] that pollutants which travel through multiple *point sources* before discharging into navigable waters are still covered by the CWA”). A pipe that discharges to a culvert that discharges to a ditch that discharges to navigable water is still within the scope of the CWA, even though that pipe itself does not discharge into the stream. See *Rapanos*, 547 U.S. at 743 (plurality opinion) (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 the CWA also extends to discharges into soil or groundwater, neither of which constitute navigable waters or discrete point-source conveyances into navigable waters, and both of which (in contradistinction from both navigable waters and discrete conveyances into navigable waters) are traditional objects of state and local regulation. See *Ky. Waterways*, 905 F.3d at 936 (explaining that the *Rapanos* plurality “sought to make clear that intermediary point sources do not break the chain of CWA liability,” not to extend the CWA to point-source-to-nonpoint-source discharges); *Tenn. Clean Water*, 905 F.3d at 444-45 (same).

The actual *holding* of *Rapanos*, moreover, forecloses reading the CWA to extend to discharges into soil or groundwater that have a “fairly traceable” connection or “direct hydrological connection” to nearby navigable waters. *Contra* Pet.App.21-24; *Upstate Forever*, 887 F.3d at 649-51. After all, *Rapanos* specifically *reversed* the Sixth Circuit for holding that “hydrological connections” to nearby navigable waters were enough to subject wetlands to the CWA. 547 U.S. at 730-31, 757; *id.* at 784 (Kennedy, J., concurring in the judgment) (rejecting “hydrologic connection” test). *Rapanos* thus makes clear that Congress did not intend the CWA to reach as broadly as the decision below and the Fourth Circuit have held, and specifically did not intend that statute to regulate discharges into soil or groundwater just because the discharged pollutants may eventually find their way into navigable waters.

II. Reading The CWA To Reach Discharges Into Soil And Groundwater Would Create An Unnecessary And Unworkable Regulatory Scheme.

Despite the statutory text, structure, and history, the Fourth and Ninth Circuits believed it necessary to extend the CWA beyond its prescribed bounds to prevent polluters from evading liability “by ensuring that all discharges pass through soil and ground water before reaching navigable waters.” *Upstate Forever*, 887 F.3d at 652; *see* Pet.App.31 (asserting that if polluters could emit discharges “indirectly ... to avoid CWA liability,” it would “make a mockery of the CWA’s prohibitions”). Of course, courts have no business “rewrit[ing] the statute that Congress has

enacted” to address some perceived regulatory gap. *Dodd v. United States*, 545 U.S. 353, 359 (2005). But even if that were a proper judicial role, the limitation on federal CWA authority was fully intentional and the gap perceived by the Fourth and Ninth Circuits is illusory. Congress understood both that what stood between the EPA and its regulation of navigable waters (namely soil and groundwater) was not some jurisdictional no-man’s land, but an area of traditional state and local control. Congress also understood that existing state and federal regulatory regimes already provide “sufficient legal authority to address releases of pollutants to groundwater ... without expanding the CWA’s regulatory reach beyond what Congress envisioned.” 84 Fed. Reg. at 16,823. And distorting the CWA to reach soil and groundwater pollution is not only constitutionally problematic and redundant, but unworkable, as the statute’s permitting scheme cannot be sensibly applied to that kind of diffuse pollution. There is no practical reason to give the CWA the expansive reading that the Fourth and Ninth Circuits have adopted, and every reason to reject that infeasible approach.

A. Numerous State and Federal Regulatory Regimes Already Cover Discharges Into Soil and Groundwater.

To begin, there is no need to artificially extend the CWA to address discharges into soil and groundwater, as any such discharges are already subject to abundant regulation by states and localities with traditional regulatory authority over soil and groundwater. The Ninth and Fourth Circuit proceeded as if all that stood between the EPA and

navigable waters was some buffer zone that interfered with efficient federal regulation. But Congress understood that the soil and groundwater were not some jurisdictional vacuum, but an area of traditional state and local regulation. And states and localities have hardly been inactive in this area of traditional authority. As the CWA itself envisions, the States have taken the lead role in regulating soil and groundwater pollution, with all 50 States adopting various programs (sometimes subject to federal oversight) to “control[] pollution added from nonpoint sources to the navigable waters within the State.” 33 U.S.C. §1329(b)(1); *see also State Contacts for NPS Pollution Programs*, EPA, <https://bit.ly/2GRKkLK> (last visited May 16, 2019). Many of these state programs specifically target groundwater pollution, in keeping with Congress’ intent to “give states primacy for regulating ubiquitous groundwater discharges” in order to “regulate groundwater quality in the manner best suited to their particular circumstances.” 84 Fed. Reg. at 16,823-24.

To take but a few examples: Arizona has enacted a state regulatory program focused on the protection of its groundwater through a comprehensive aquifer protection permitting program and water quality standards. *See* Ariz. Rev. Stat. §§49-223-224, 49-241-252. Colorado law takes a similar approach, prohibiting any unpermitted discharge of a statutorily defined pollutant into any state waters, including any “subsurface waters which are contained in or flow in or through” the State. Colo. Rev. Stat. §§25-8-103(19), 25-8-501(1). Kentucky likewise prohibits unpermitted discharges into “surface and underground” water. Ky. Rev. Stat. §§224.1-300(6), 224.70-110. Texas

implements its own state permitting regime overseen by the Texas Commission on Environmental Quality, regulating the “discharge [of] sewage, municipal waste, recreational waste, agricultural waste, or industrial waste into or adjacent to any water in the state,” specifically including groundwater. Tex. Water Code Ann. §§26.001(5), 26.121(a). The Texas Risk Reduction Program also includes measures specifically designed to address groundwater contamination. See Tex. Admin. Code §§350.1-.135. West Virginia’s Water Pollution Control Act broadly protects “any and all water on or beneath the surface of the ground” against unpermitted discharges of “sewage, industrial wastes or other wastes, or the effluent therefrom.” W. Va. Code §§22-11-3(23), 22-11-8(b)(1); see also Groundwater Protection Act, W. Va. Code §22-12-1 *et seq.* (establishing state groundwater management program). As this sample suggests, similar state regulatory regimes focused on groundwater protection are widespread across the nation.

These state programs provide robust oversight and enforcement. In fact, *amici* can attest to that from direct experience, as they have worked closely with the state agency tasked with regulating soil and groundwater contamination (the South Carolina Department of Health and Environmental Control) in their extensive remediation efforts in South Carolina. See *Upstate Forever*, 887 F.3d at 644; *id.* at 653 (Floyd, J., dissenting); see also, e.g., *Ky. Waterways*, 905 F.3d at 931-32 (explaining involvement of the Kentucky Department of Environmental Protection in regulating and monitoring soil and groundwater contamination from coal ash ponds); 84 Fed. Reg. at

16,824 (describing other “state laws and regulations that prohibit or limit discharges of pollutants to groundwater”).

These state programs are complemented by federal statutes that (unlike the CWA) are specifically focused on soil and groundwater pollution. *See* 84 Fed. Reg. at 16,824-26 (describing relevant federal statutes). The “explicit provisions addressing discharges to groundwater in these statutes” make clear that Congress has already “directly address[ed] the issue of groundwater quality in specific federal programs,” making it doubly unnecessary to stretch the CWA to regulate discharges that other state and federal laws already cover. *Id.* at 16,824; *see Tenn. Clean Water*, 905 F.3d at 445 (explaining that “Congress specifically designed other environmental statutes to partner with the CWA,” and “allowing the CWA to cover [discharges to groundwater] would disrupt the existing regulatory framework”).

The Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. §§6901 *et seq.*, provides one striking example. That statute is designed to regulate waste management in order to “reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated.” *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483 (1996). Unlike the CWA, which reaches only discharges to navigable waters, RCRA expressly covers discharges of waste “into any waters, including ground waters.” 42 U.S.C. §6903(3). That difference in language is no mere happenstance; on the contrary, RCRA (which was enacted four years after the CWA) was specifically intended to extend

beyond the CWA by regulating not only “runoff into navigable waters” but also “migration into groundwater supplies.” EPA, *Report to Congress, Disposal of Hazardous Wastes* 19 (June 30, 1973) available at <https://bit.ly/2UTpxLI>; see 42 U.S.C. §6907(a)(2) (addressing “protection of the quality of ground waters”); 84 Fed. Reg. at 16,825 (explaining that RCRA “include[s] provisions for federal regulation of discharges into groundwater, to protect groundwater quality from the discharge of solid and hazardous wastes”).

At the same time, RCRA “explicitly exempts from its coverage any pollution that is subject to CWA regulation.” *Ky. Waterways*, 905 F.3d at 937 (citing 42 U.S.C. §6903(27)). Accordingly, if the CWA were interpreted to extend to discharges of waste into groundwater, those discharges “would be exempted from RCRA’s coverage,” *id.* at 938—taking them outside the scope of the statute specifically designed to handle them. That cannot be what Congress intended. *Id.*; see *Tenn. Clean Water*, 905 F.3d at 445.

Similar conflicts arise under the regulations that EPA has issued to implement RCRA. For instance, EPA has promulgated regulations that impose specific groundwater monitoring and remediation requirements on surface impoundments and landfills that store coal ash (also called “coal combustion residuals”) produced by coal-burning power plants. See 80 Fed. Reg. 21,302 (Apr. 17, 2015). Those regulations require coal ash repositories to extensively monitor nearby groundwater, and to “ensure that groundwater contamination at new and existing [coal ash repositories] will be detected and cleaned up as

necessary to protect human health and the environment.” *Id.* at 21,396; *see also id.* at 21,404 (requiring additional monitoring if groundwater contamination is detected above certain levels); 84 Fed. Reg. at 16,825. If the CWA were to reach discharges from coal ash repositories into groundwater, however, those discharges would be exempted by statute from the very regulatory scheme specifically designed to handle them. 42 U.S.C. §6903(27); *see Ky. Waterways*, 905 F.3d at 938; *Tenn. Clean Water*, 905 F.3d at 445-46 (explaining that RCRA regulations, “not the CWA, is the framework envisioned by Congress ... to address the problem of groundwater contamination” from coal ash ponds).

A number of other federal statutes specifically regulate soil and groundwater pollution, underlining the lack of any need to judicially extend the CWA into this area. For instance, the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. §9601 *et seq.*, governs the release of hazardous substances or other pollutants into the environment (specifically defined to include “ground water”). 42 U.S.C. §9601(8); *see also id.* §9604(a)(1). CERCLA “provide[s] a variety of mechanisms for EPA to address hazardous substances in groundwater,” including the ability to issue remediation orders and recover remediation costs. 84 Fed. Reg. at 16,825-26; *see, e.g., EPA, Summary of Key Existing EPA CERCLA Policies for Groundwater Restoration, OSWER Directive 9283.1-33* (June 26, 2009), available at <https://bit.ly/2DE3bYO>; *Superfund Groundwater Guidance and Reports*, EPA, <https://bit.ly/2IRdm0r> (last visited May 16, 2019). The Safe Drinking Water Act, 42 U.S.C. §300f *et seq.*,

likewise “contains provisions specifically aimed at preventing certain types of groundwater contamination,” including requirements for state programs to regulate underground injection of fluids. 84 Fed. Reg. at 16,824; *see, e.g.*, 42 U.S.C. §300h. And the Oil Pollution Act provides yet another federal regulatory scheme addressing pollution of soil and groundwater, in the specific context of oil releases that damage “natural resources” (explicitly defined to include “ground water”). 33 U.S.C. §§2701(20), 2706.

In sum, there is already an extensive “mosaic of laws and regulations that provide mechanisms and tools for EPA, states, and the public to ensure the protection of groundwater quality, and to minimize related impacts to surface waters.” 84 Fed. Reg. at 16,824. Given those tailored regulatory schemes for addressing discharges into soil and groundwater, there is no plausible reason to fear that interpreting the CWA according to its text and history will leave polluters free to contaminate at will.

B. Extending the CWA to Groundwater Pollution Would Create an Unworkable and Incoherent Regulatory Scheme.

Reading the CWA to cover discharges into soil and groundwater is not only unnecessary, but also unworkable. Adopting a strained interpretation of the statutory text to extend the CWA to such discharges will produce massive regulatory uncertainty and substantial unnecessary burdens for both regulators and regulated parties.

1. As if to emphasize the confusion that would result from interpreting the CWA to reach discharges into groundwater, the two circuits that have

attempted that approach cannot even agree on how the statute should apply in that context. In *Upstate Forever*, the divided Fourth Circuit panel held that the CWA extends to any discharges into groundwater with a “direct hydrological connection” to navigable waters. 887 F.3d at 651. In the decision below, the Ninth Circuit explicitly rejected that test for “read[ing] two words into the CWA (‘direct’ and ‘hydrological’) that are not there”—and then proceeded to adopt its own atextual test, asking whether the discharge into groundwater is “fairly traceable” to some later contamination in navigable waters. Pet.App.24 n.3; see Pet.App.25 (refusing to decide “when, if ever, the connection between a point source and a navigable water is too tenuous to support liability under the CWA”). The fact that the Fourth and Ninth Circuits cannot decide on a single consistent standard for applying the CWA to discharges into groundwater is an inevitable consequence of venturing forth without statutory guidance and a strong signal that they should not have been engaged in that atextual project at all.

Worse still, neither the “fairly traceable” nor the “direct hydrological connection” standard provides any reliable definition of the discharges that fall within the CWA’s scope, making it impossible for regulated parties to know in advance if any given discharge will need a NPDES permit. Indeed, the decision below specifically refused to provide any clarity on the scope of its “fairly traceable” standard, “leav[ing] for another day the task of determining when, if ever, the connection between a point source and a navigable water is too tenuous to support liability under the CWA.” Pet.App.25. That guess-at-your-own-peril

approach to CWA jurisdiction creates enormous uncertainty for individuals and entities attempting to determine whether sources that they own are covered. Instead of providing the “clarity and predictability” that is vitally important in this regulatory context, *Sackett v. EPA*, 566 U.S. 120, 133 (2012) (Alito, J., concurring), the kind of nebulous standards adopted below and by the Fourth Circuit will ensure that the only certainty is increased regulatory confusion.

That confusion is especially problematic in this context in light of the substantial burden required to obtain a NPDES permit and the even more substantial penalties for failing to obtain a required permit. As this Court has recognized, the costs of obtaining a NPDES permit “are significant.” *Hawkes*, 136 S. Ct. at 1812. Applications for a “general” permit, used for activities that “cause only minimal individual and cumulative environmental impacts,” 33 C.F.R. §323.2(h), consume, on average, 313 days of time and \$28,915 of capital. *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.* The penalties for failing to obtain a required permit can include civil penalties of over \$50,000 *per day* for each violation, and criminal penalties ranging from a minimum of \$2500 up to a maximum of \$500,000 for an individual or \$2 million for an organization. Given the enormous costs of compliance and sizable penalties for noncompliance, there must be a clear line that will enable potentially regulated entities to determine in advance whether a NPDES permit is required—not an

utterly unpredictable standard that will force them to choose between obtaining a costly permit they should not need and risking massive fines for discharges the CWA was not meant to cover.

2. Expanding the definition of a CWA violation to encompass all pollutants that eventually make their way into navigable waters would also distort other aspects of the statutory scheme. In *Upstate Forever*, for instance, the plaintiffs sued under the CWA's citizen-suit provision, which allows private parties to bring a civil action against any person who is alleged "to be in violation of" the statute. 33 U.S.C. §1365(a). That language requires plaintiffs to demonstrate an ongoing "continuous or intermittent violation" of the CWA, rather than just "wholly past violations." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 57 (1987).

That requirement has nothing to do with Article III jurisdiction properly understood and everything to do with private plaintiffs' failure to state the kind of claim required by the statute. *Cf. Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-28 (2014) (whether plaintiff "falls within the class of plaintiffs whom Congress has authorized to sue" goes to whether plaintiff "has a cause of action under the statute," not whether court has Article III jurisdiction). Indeed, Justice Scalia writing for the Court in *Steel Co.* dismissed the characterization of the issue in *Gwaltney* as "jurisdictional" as a "drive-by jurisdictional ruling" if not "dictum" (since nothing turned on the label there), and underscored that "it is fanciful to think that *Gwaltney* revised our established jurisprudence that the failure of a cause of action does

not automatically produce a failure of jurisdiction.” *Steel Co.*, 523 U.S. at 91.

Thus, under any reasonable interpretation of the CWA, the “ongoing violation” requirement should have barred the citizen suit in *Upstate Forever* on the merits, as the leak there was repaired two years before the plaintiffs filed suit. But the Fourth Circuit nevertheless found *Gwaltney* satisfied because some detectable amount of contamination was continuing to seep through groundwater into nearby navigable waters, even though the actual discharge from the only identifiable point source (the leak in the pipe) had ceased years ago. *Upstate Forever*, 887 F.3d at 646-49.

That radical expansion of what constitutes an “ongoing violation” of the CWA illustrates the absurd consequences that follow from interpreting the statute to focus on whether pollutants are finding their way to navigable waters, instead of on whether they are being discharged from a point source to navigable waters. By substituting a “fairly traceable” or “direct hydrological connection” test for the statutory requirement of an actual discharge from a point source into navigable waters, the decision below, the Fourth Circuit’s decision in *Upstate Forever*, and other decisions that have embraced the same faulty reasoning allow courts to find ongoing violations without any ongoing discharge. Indeed, in *Tennessee Clean Water*, the district court found that a coal ash pond that had been closed *20 years earlier* and no longer even contained any water constituted an “ongoing” violation of the CWA, on the theory that contaminants from the wooded site of the former facility were continuing to find their way to navigable

waters “through rainwater vertically penetrating the Site, groundwater laterally penetrating the Site, or both.” *Tenn. Clean Water*, 905 F.3d at 440-41.

That scheme—under which the CWA continues to be violated as long as pollutants are still “reaching navigable waters,” *Upstate Forever*, 887 F.3d at 649—is not remotely the statutory scheme that Congress enacted. It severs the connection between the “discharge of any pollutant ... to navigable waters from any point source,” 33 U.S.C. §1362(12), and the possibility of a permit for such discharges. *See infra*. The lingering seepage through soil and groundwater of pollutants from a long-ago-ceased spill or long-ago-impounded ash pond cannot plausibly be understood as an “ongoing discharge” from a point source, which should provide an independent basis for dismissal of such suits for failure to state a claim.

3. Treating soil and groundwater pollution as within the scope of the CWA would also pose intractable practical problems. As the *Upstate Forever* dissent observed, the NPDES permitting program is hopelessly “ill-equipped to address ... nonpoint source pollution.” 887 F.3d at 657 (Floyd, J., dissenting). NPDES permits are designed to regulate “discernible, confined and discrete conveyance[s],” 33 U.S.C. §1362(14), by imposing “effluent limitations” that dictate how much of a given pollutant may be discharged through those conveyances into navigable waters, *id.* §1311(b)(1)(A). That system makes sense in the context of discharges from identifiable point sources to navigable waters, since effluent levels can easily be measured at the point of discharge. But it cannot be sensibly applied to regulate the seepage of

pollutants through diffuse underground channels that ultimately carry groundwater into navigable waters. Not only does the rate of seepage through soil or groundwater depend on countless variable hydrological factors, but if there is no identifiable “discharge,” then there is no identifiable point at which to measure the amount of pollutants leaving the point source or entering navigable waters. The obvious practical problems with trying to impose the NPDES permitting program on soil and groundwater pollution confirm that Congress never intended to fit that square peg into this round hole.

The fundamental incongruence of applying the CWA to soil and groundwater pollution is readily evident in cases such as *Upstate Forever*, *Kentucky Waterways*, and *Tennessee Clean Water*. It is not at all clear how *amici* are supposed to apply for a NPDES permit for the lingering seepage of long-ago-spilled gasoline from a pipeline leak (in *Upstate Forever*), or how coal plant operators are supposed to apply for a NPDES permit for the diffuse migration of contaminants from coal ash ponds through soil and groundwater (in *Kentucky Waterways* and *Tennessee Clean Water*). The NPDES permitting scheme simply was not designed to measure and control that type of diffuse pollution.

Of course, that is not lost on the plaintiffs who are bringing these cases. To the contrary, those plaintiffs unabashedly have invoked the CWA not to require defendants to obtain a permit for controlled discharges, but in hopes that a federal court will seize jurisdiction over the pollution at issue and displace ongoing state management and remediation efforts.

See Upstate Forever, 887 F.3d at 644 (citing plaintiffs' displeasure with state-supervised monitoring and remediation); *Ky. Waterways*, 905 F.3d at 931-32 (same); *Tenn. Clean Water*, 905 F.3d at 440-41 (same). When plaintiffs have succeeded in convincing courts to validate these claims, the results have been predictably incongruous. In *Tennessee Clean Water*, for instance, the plaintiffs challenged the adequacy of state efforts to address the seepage of lingering pollutants underneath a long-ago-closed Tennessee Valley Authority ("TVA") coal ash disposal site that is now a heavily vegetated and wooded plot of land. *See* 905 F.3d at 439-41. After the district court ruled for the plaintiffs, it did not order TVA to get an NPDES permit for that seepage; it instead ordered TVA to "fully excavate the coal ash," by removing 13.8 million cubic yards of earth, and "relocate it to a lined facility." *Id.* at 442. Whatever the propriety of such a remedy under RCRA, CERCLA, or myriad state-law analogs, when the remedy for a Clean Water Act violation is the removal of 13.8 million cubic yards of *earth* something has gone far off course.

* * *

The decision below conflicts with the text, structure, and history of the CWA; with this Court's precedent; and with the views of the agency charged with implementing the statutory scheme. It not only will force regulators and regulated entities to waste substantial resources on NPDES permits in circumstances that Congress never intended, but ultimately will drive the NPDES permitting scheme to swallow whole the myriad state and federal regulatory schemes designed to address soil and groundwater

contamination. Congress did not design the CWA to solve all of the nation's environmental problems. It designed that statute to address only the one type of pollution that the statutory text specifies: the discharge of pollutants from a point source to navigable waters. Because the decision below extends the CWA far beyond that intended scope, this Court should reverse.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted,

PAUL D. CLEMENT

Counsel of Record

ERIN E. MURPHY

C. HARKER RHODES IV

LAUREN N. BEEBE

KIRKLAND & ELLIS LLP

1301 Pennsylvania Avenue, NW

Washington, DC 20004

(202) 389-5000

paul.clement@kirkland.com

Counsel for Amici Curiae

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