No. 18-268

IN THE
Supreme Court of the United States

KINDER MORGAN ENERGY PARTNERS, L.P., ET AL.,
Petitioners,

v.

UPSTATE FOREVER, ET AL.,
Respondents.

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

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND UTILITY WATER ACT GROUP SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

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.

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae the Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional

[1] Pursuant to Rule 37.2(a), *amici* provided timely notice of its intention to file this brief to counsel for all parties. Petitioners filed a blanket consent to all amicus briefs. Respondents' counsel of record consented to the filing of this brief. In accordance with this Court's Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, have made a monetary contribution to the preparation or submission of this brief.

organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases such as this one that raise issues of concern to the Nation's business community.

Amicus Curiae UWAG is a voluntary, non-profit, unincorporated group of more than 145 individual energy companies and three national trade associations of energy companies. UWAG's purpose is to protect its members' interests by participating on their behalf in federal agency rulemakings under the Clean Water Act (CWA) and related statutes, and litigation arising from those rulemakings. Every day, power companies like those participating in UWAG supply cost-effective power to millions of residential, commercial, institutional, and industrial customers nationwide. Like many other businesses, they own and operate infrastructure that could be subject to CWA regulation under the "direct hydrological-connection" theory at issue in this case. Pet. App. 23.

The Fourth Circuit's breathtaking expansion of the CWA's National Pollutant Discharge Elimination System (NPDES) permitting program to cover groundwater threatens interests of great importance to *amici*'s members. The business community (including the power industry) support safe, effective, and efficient environmental regulation. The decision below imperils these objectives. Indeed, applying the CWA to point sources that, accidentally or by design, convey pollutants to groundwater—an area already extensively regulated by other state and federal programs—will create a regulatory morass of duplicative and potentially conflicting regulation. The regulatory uncertainty and

vastly increased compliance costs that will follow this sea change in CWA law will impose substantial burdens on the regulated public that Congress never intended.

SUMMARY OF ARGUMENT

The decision below merits this Court's review on multiple levels. There is a clear circuit split on whether the CWA's point source program applies when pollutants are conveyed to navigable waters through groundwater—one that has deepened further since the filing of the petition.

The issues implicated in the decision below are also of substantial importance. Congress drew a clear line delineating the scope of federal permitting and enforcement under the CWA's point source permitting program. The program covers discharges from point sources into navigable waters. Other sources of pollutants, including those that reach navigable waters through groundwater, are covered by an array of other state and federal laws that are properly designed to ensure protection of human health and the environment. The court of appeals' expansion of the CWA disrupts that established framework by adding in a statute that was never designed to regulate groundwater.

Further exacerbating the problem, the decision below also adopted an unprecedented interpretation of the CWA's citizen-suit provision that transforms it from an enforcement backstop into a dominant authority that threatens the States' and EPA's roles as the statute's primary enforcers—despite this Court's explicit rejection of that approach decades ago.

The result will be regulatory uncertainty, wasteful overlap, and unreasonable compliance costs. Without this Court's intervention, the decision below will create widespread impacts on countless individuals, entities, and the Nation as a whole.

ARGUMENT

I. THE GROWING CONFLICT AMONG THE CIRCUITS ON THIS QUESTION DEMANDS THIS COURT'S REVIEW

Petitioners ably chronicled the entrenched circuit split on whether the discharge prohibition under the point source program applies when pollutants are conveyed by point sources to navigable waters through groundwater. Pet. 16-20. That disagreement has further deepened since the filing of the petition, as the Sixth Circuit has now weighed in. See *Ky. Waterways All.* v. *Ky. Utils. Co.*, No. 18-5115, 2018 WL 4559315 (6th Cir. Sept. 24, 2018); *Tenn. Clean Water Network* v. *Tenn. Valley Auth.*, No. 17-6155, 2018 WL 4559103 (6th Cir. Sept. 24, 2018). In *Kentucky Waterways*, the Sixth Circuit rejected the "'hydrological connection' theory" that the Fourth Circuit adopted below. 2018 WL 4559315, at *5. Indeed, the court explicitly noted its "disagree[ment] with the decisions from our sister circuits in *Upstate Forever* v. *Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018), and *Hawai'i Wildlife Fund* v. *Cty. of Maui*, 886 F.3d 737 (9th Cir. 2018)." *Ibid.*

The Sixth Circuit's opinion echoes many of the petitioners' arguments based on the text, structure, and history of the CWA. Compare *Ky. Waterways*, 2018 WL 4559315, at *7-9, *with* Pet. 21-29. It recognized that "[t]he CWA's text * * * forecloses the hydrological connection theory." *Ky. Waterways*, 2018 WL 4559315, *7. Moreover, the court concluded that "[r]eading the CWA to cover groundwater pollution * * * would upend the existing [state and federal] regulatory framework." *Id.* at *9. In announcing that holding, the Sixth Circuit widened the circuit split on this issue and exposed the fundamental flaws in the Fourth and Ninth Circuits' position.

II. THE DECISION BELOW OVERLOOKS CONGRESSIONAL LIMITS ON FEDERAL CWA AUTHORITY AND THE EXISTING STATE AND FEDERAL REGULATORY REGIMES GOVERNING GROUNDWATER

A. Congress purposefully limited the federal government's CWA authority to "navigable waters." 33 U.S.C. §§ 1311, 1362(12). Prior to its enactment, EPA asked Congress for authority over groundwater so as to regulate discharges to groundwater under the CWA and prevent polluted groundwater from impacting surface waters. See Pet. 22-23. Congress rejected that request, *id.* at 23, and the CWA plainly differentiates between jurisdictional "navigable waters" and "ground waters." 33 U.S.C. §§ 1252(a), 1254(a)(5).

The lower court's application of point source permitting requirements to discharges of pollutants into groundwater with a direct hydrological connection to a "navigable waters" eviscerates that statutory distinction by allowing—and indeed requiring—federal regulation of not just "navigable waters," but of hydrologically connected groundwater as well.

Indeed, the CWA's focus on "navigable waters" recognizes that numerous other state and federal regulatory programs have been developed to protect groundwater. Thus, the Fourth Circuit's expansion of the CWA to cover groundwater with a direct hydrological connection to navigable waters does not plug some inadvertent regulatory gap.

B. All fifty states exercise their broad police powers to protect their groundwater from pollution. To take one representative example, Texas has implemented a permitting regime overseen by the Texas Commission on Environmental Quality. Without such a permit, it is illegal to "discharge sewage, municipal waste,

recreational waste, agricultural waste, or industrial waste into or adjacent to any water in the state," including "groundwater." Tex. Water Code Ann. §§ 26.001(5), 26.121(a). The Texas Risk Reduction Program further safeguards Texas groundwater. See 30 Tex. Admin. Code §§ 350.1-350.135. That comprehensive program provides for investigation and remediation of contaminated sites within the state and includes measures specifically designed for groundwater contamination. See, *e.g.*, *id.* §§ 350.32-350.33 (providing remedial standards for groundwater); *id.* § 350.52 (establishing a "groundwater resource classification system"); *id.* § 350.75(i) (including groundwater-to-surface-water pathway in remediation framework). The other forty-nine states employ similar regulatory regimes to protect their groundwater.[2]

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[2] See Ala. Code § 22-22-9(I)(3); Alaska Stat. Ann. § 46.03.710; Ariz. Rev. Stat. Ann. §§ 49-221, 49-241, 49-263; Ark. Code Ann. § 8-4-217; Cal. Water Code §§ 13260(a)(1), 13304(a); 5 Colo. Code Regs. § 1002-61:61.3; Conn. Gen. Stat. Ann. §§ 22a-427, 22a-430; Del. Code Ann. tit. 7, § 6003(a); D.C. Code Ann. § 8-103.02; Fla. Stat. Ann. §§ 403.088(1), 403.161(1); Ga. Code Ann. § 12-5-30; Haw. Rev. Stat. Ann. § 342D-50; Idaho Code Ann. §§ 39-3618, 39-3620; Idaho Admin. Code r. 58.01.11.400; 415 Ill. Comp. Stat. Ann. 5/12; Ind. Code Ann. § 13-18-4-5; Iowa Code Ann. § 455B.186; Kan. Stat. Ann. § 65-164; Ky. Rev. Stat. Ann. §§ 224.70-224.110; La. Stat. Ann. §§ 30:2075, 30:2076; Me. Rev. Stat. tit. 38, § 413; Md. Code Ann., Envir. § 9-322; Mass. Gen. Laws Ann. ch. 21, §§ 42-43; Mich. Comp. Laws Ann. § 324.3109(1); Mich. Admin. Code r. 323.2201(i), 323.2204-05; Minn. Stat. Ann. § 115.061; Minn. R. 7050.0210; Miss. Code. Ann. § 49-17-29(2)(a); Mo. Ann. Stat. § 644.051; Mont. Code Ann. § 75-5-605; Neb. Rev. Stat. Ann. § 81-1506; Nev. Rev. Stat. Ann. § 445A.570; Nev. Admin. Code 445A.228, 445A.314; N.H. Rev. Stat. Ann. §§ 485-A:12, 485-A:13; N.J. Stat. Ann. § 58:10A-6; N.M. Stat. Ann. § 74-6-4; N.M. Admin. Code 20.6.2.1201, 20.6.2.3104; N.Y. Envtl. Conserv. Law § 17-0501; N.C. Gen. Stat. Ann. § 143-215.1(a)(6); N.D. Cent. Code Ann. § 61-28-06; Ohio Rev. Code Ann. § 6111.04; Okla. Stat. Ann. tit. 27A, § 2-6-105; Or. Rev. Stat. Ann. § 468B.025(1); 35 Pa. Stat. Ann.

C. While Congress did not apply the CWA's strict liability regime to groundwater discharges, it did address specific groundwater concerns in other federal statutes. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) empowers the Environmental Protection Agency (EPA) to remedy the "release" of any "hazardous substance" and certain other "pollutants" into the "environment," a term that specifically includes "ground water." 42 U.S.C. §§ 9601(8), 9604(a)(1). Indeed, EPA has developed principles to guide its efforts in this area and maintains a vast store of groundwater guidance, reports, and tools for its Superfund Remedial Project Managers. See EPA, Summary of Key Existing EPA CERCLA Policies for Groundwater Restoration, OSWER Directive 9283.1-33 (June 26, 2009);[3] EPA, Superfund Groundwater Guidance and Reports.[4] For example, the National Oil and Hazardous Substance Pollution Contingency Plan, which provides the blueprint for CERCLA implementation, states that "EPA expects to return usable ground waters to their beneficial uses wherever practicable." 40 C.F.R. § 300.430(a)(iii)(F).

The Resource Conversation and Recovery Act (RCRA), moreover, provides EPA with specific powers over groundwater contamination from solid waste disposal. See 42 U.S.C. §§ 6902, 6911, 6944. Part of the

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§ 691.401; 25 Pa. Code § 93.8a(a); 46 R.I. Gen. Laws Ann. § 46-12-5; S.C. Code Ann. § 48-1-90(A)(1); S.D. Codified Laws §§ 34A-2-21, 34A-2-22; Tenn. Code Ann. § 69-3-108(b); Utah Code Ann. § 19-5-107(1); Vt. Stat. Ann. tit. 10, § 1259; Va. Code Ann. §§ 62.1-44.5(A), 62.1-194.1; Wash. Rev. Code §§ 90.48.080, 90.48.160; W. Va. Code Ann. § 22-11-8; Wis. Stat. Ann. §§ 281.19(1), 281.20(1)(a); Wyo. Stat. Ann. § 35-11-301.

[3] https://semspub.epa.gov/work/HQ/175202.pdf.

[4] https://www.epa.gov/superfund/superfund-groundwater-guidance-and-reports.

impetus for RCRA was EPA's alerting Congress of the need to fill gaps created by the CWA regarding "pollutant discharges normally associated with improperly managed hazardous waste disposal facilities" and their "migration into groundwater supplies." Legislative History of the Resource Conservation and Recovery Act of 1976 P.L. 94-580, Report to Congress by the EPA Pursuant to Section 212 of the Solid Waste Disposal Act, As Amended 19 (June 1974). Under this statutory authority, EPA has promulgated regulations protecting groundwater, including a comprehensive program that provides for monitoring and remediation of groundwater affected by certain waste treatment and storage facilities. See 40 C.F.R. §§ 258.50-258.58.[5]

The Safe Drinking Water Act (SDWA) also includes extensive provisions to ensure the safety of "underground sources of drinking water." 42 U.S.C §§ 300h-300h-8. The SDWA specifically focuses on the dangers posed by injection wells and sets up a regulatory structure to protect groundwater from contamination from such activities. *Ibid.*

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[5] CERCLA and RCRA both exclude certain types of petroleum and drilling materials from their scope. See 42 U.S.C. § 9601(14) (CERCLA excluding "petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance"); 40 C.F.R. § 261.4(b)(5) (RCRA excluding "[d]rilling fluids, produced waters, and other wastes associated with the exploration, development, or production of crude oil, natural gas or geothermal energy"). But the statutes still have broad coverage, and other state and federal regulatory programs, such as the one created by the Oil Pollution Act, 33 U.S.C. § 2701 *et seq.*, ably fill any gaps. Moreover, the opinion below reaches far beyond oil spills. It would apply to any covered pollutants regardless of the well-established regimes designed to prevent and clean up such discharges.

In short, the states and the federal government are already regulating groundwater. There was no need for the Fourth Circuit to stretch the CWA to cover this area. And doing so promises expensive and ineffective groundwater regulation. This Court's intervention is needed to restore the regulatory balance struck by Congress and our federal system.

III. THE FOURTH CIRCUIT'S CONTINUING-VIOLATION HOLDING DIRECTLY CONTRAVENES THIS COURT'S PRECEDENTS

The Fourth Circuit compounded its erroneous extension of the CWA to cover groundwater by expanding the citizen-suit provision well beyond its plain text. This Court settled the question of whether the CWA "confers federal jurisdiction over citizen suits for wholly past violations" in *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 52 (1987). Justice Marshall reasoned that based on its text, structure, and history, the CWA establishes the States and EPA as its primary enforcers and authorizes citizen suits only for "ongoing violation[s]," "not * * * for wholly past violations." *Id.* at 59, 64. That has been the uniform law of the land for over three decades.

The decision below brings an end to that stability. It holds that even though the "ruptured pipeline[—the source of the pollutants at issue—]has been repaired" and the discharges from it have ceased, the citizen-suit provision nevertheless applies. Pet. App. 17. The court justified that conclusion because "pollutants continue to be added to navigable waters" through their slow migration through groundwater. *Id.* at 18 (emphasis omitted).

It is difficult to overstate the breadth of that holding. Whereas before, an "ongoing violation" required an entity to be contemporaneously discharging pollutants,

now all that is needed are allegations that pollutants conveyed into groundwater by a point source in the past are indirectly migrating to navigable waters.

Under the Fourth Circuit's decision, there are no "temporal conditions on the discharge of a pollutant to a point source." Pet. App. 16. Rather, even if a point source ceases all "discharges" of pollutants, as long as pollution reaching "navigable waters" is traceable to a discrete source, citizens can bring a suit for an ongoing CWA violation. *Id.* at 15-16. Because nearly all pollution is traceable back to some source, it is difficult to envision any meaningful limits on the authority of citizen plaintiffs under the Fourth Circuit's reasoning.

Such an interpretation not only subjects the groundwater itself to point source regulation, but it also transforms the citizen-suit provision from a "supplementary" and "interstitial" backstop into a "potentially intrusive" mechanism that could "undermine" the States' and EPA's role as the primary enforcers of the CWA—the precise outcome this Court rejected in *Gwaltney*. 484 U.S. at 60-61. It allows citizens to bring suits not to remedy a lack of vigilance on the part of the States and EPA regarding an ongoing discharge, but rather to force action long after a point source discharge is stopped and notwithstanding those primary enforcers' having addressed groundwater impacts. Indeed, even if a state regulatory agency is actively overseeing a groundwater remediation program designed to protect health and the environment—as is happening here, Pet. App. 27-28 (Floyd, J., dissenting)—there is nothing to stop citizen suits from forcing a court-made remedy that will upend that ongoing remediation.

The Court should enforce *Gwaltney* and reverse the Fourth Circuit's opinion that would otherwise create a

roadmap for circumventing the limits on CWA citizen suits.

IV. THE COURT OF APPEALS' EXPANSION OF THE CLEAN WATER ACT CREATES CRIPPLING UNCERTAINTY

"[C]larity and predictability" are critical in the CWA context because the combination of an "uncertain reach of the Clean Water Act and the draconian penalties imposed for * * * violations" cannot be tolerated. *Sackett* v. *EPA*, 566 U.S. 120, 132-133 (2012) (Alito, J., concurring). The regulatory chaos that will follow in the wake of the decision below will create uncertainty and impose exorbitant costs on the public.

A. Under the decision below, regulated individuals and entities will be forced to navigate a regulatory labyrinth with pitfalls at every turn. The first question they face is whether particular activities that may affect groundwater now require a point source permit. The potential reach of the decision below is sweeping. Septic systems—both large commercial ones and the ubiquitous personal ones that dot rural America—could fall within its rationale, requiring a federal permit and federal oversight at countless private properties. For example, leaking municipal storm sewers, brownfield cleanup sites, and other locations from which historical pollution occurred could also come within the point source program's crosshairs. Various kinds of basins and impoundments, like those employed in agricultural operations or for stormwater control, could face CWA regulation under this judicially expanded version of the statute as well, if they employ infrastructure that qualifies as a confined, discrete conveyance to groundwater. And that is just the beginning of a much longer list, for it takes little creativity to tie a whole host

of personal and commercial activities to impacts on groundwater.

Moreover, to avoid the "crushing" penalties levied for even "inadvertent" unpermitted discharges, *U.S. Army Corps of Eng'rs* v. *Hawkes Co.*, 136 S. Ct. 1807, 1816 (2016) (Kennedy, J., concurring), every company and individual that is engaged in any of these activities must—in addition to complying with other federal, state, and local regulations—also determine (1) whether their activities could amount to a confined, discrete conveyance of pollutants to groundwater and (2) if so, whether that groundwater has a so-called "direct" hydrological connection to navigable waters. That complicated analysis comes with a steep financial cost, one that must be borne by sophisticated commercial enterprises and rural residents alike. To make matters worse, because the science is imperfect and the new hydrological-connection standard is subjective and imprecise (*e.g.*, EPA has never defined "direct" in any rule or guidance), even the most conscientious actor will not obtain anything approaching certainty regarding whether he is subject to a strict liability permitting regime that carries both civil and criminal penalties for noncompliance.

The regulated individual or entity's task becomes all the more onerous after that initial step. If, for example, a septic-system operator decides that a hydrological study is concerning enough to justify seeking a CWA permit, it faces a daunting road ahead. Obtaining permits under the CWA is "arduous, expensive, and long" at the best of times. *Id.* at 1815. The challenges confronting a groundwater-discharge applicant are even more severe.

That is because the point source permitting program is designed for discrete discharges into navigable waters. It imposes "effluent limitations" on "discernible, confined and discrete conveyance[s]," 33 U.S.C. §§ 1362(12), (14),

and requires precise effluent measurement and monitoring. See generally EPA, NPDES Permit Writer's Manual, EPA-833-K-10-001 (Sept. 2010).[6] The types of measurements and monitoring the point source permitting program demands are infeasible at best and impossible at worst in the context of groundwater discharges. The point source permitting program is thus ill-equipped to handle the flood of groundwater permits that will soon inundate it.

Assuming our hypothetical operator somehow gets a permit despite those difficulties, the cost of compliance can also be prohibitive, particularly when viewed in conjunction with the compliance costs associated with the other federal, state, and local regulatory programs that already protect groundwater. And failure to obtain a permit could preclude land use or business operations and lead to "crushing" financial or even criminal penalties for unpermitted discharges. *Hawkes*, 136 S. Ct. at 1816 (Kennedy, J., concurring).

Thus, at best, the Fourth Circuit's interpretation will force a host of new individuals and businesses to protectively seek burdensome and possibly duplicative CWA permits. At worst, it will discourage and restrict environmentally sound practices.

B. Even before the decision below, the point source permitting program imposed staggering costs in the pursuit of its laudable goals. According to EPA estimates, the public spends over 26 million labor hours and over $1 billion annually in applying for and complying with point source permits. EPA, ICR Supporting Statement, Information Collection Request for National Pollutant Discharge Elimination System (NPDES) Program (Renewal), OMB Control No. 2040-

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[6] https://www.epa.gov/npdes/npdes-permit-writers-manual.

0004, EPA ICR No. 0229.22, at 23, tbl. 12.1 (Sept. 2017).[7] Now that the Fourth and Ninth Circuits have vastly expanded the program's reach, those costs can be expected to rise exponentially. And that is before factoring in the opportunity costs of businesses rejecting otherwise profitable and economically efficient endeavors because of the newly added compliance costs or the risk of inadvertent violations of the court of appeals' amorphous standard.

In exchange for this increase to the public's regulatory burden, expanding the scope of the point source permitting program would add virtually nothing of value to the existing body of regulatory programs that protect groundwater. Without this Court's intervention, the path forward is thus paved with the worst kind of deadweight social costs. The Court should act to restore the long-standing limits on the reach of the CWA and its point source permitting program that the statute's text, intent, and history demand.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[7] https://www.regulations.gov/document?D=EPA-HQ-OW-2008-0719-0110.

Respectfully submitted.

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