No. 17-1640

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UPSTATE FOREVER and SAVANNAH RIVERKEEPER,

Plaintiffs-Appellants,

v.

KINDER MORGAN ENERGY PARTNERS, L.P., and PLANTATION PIPE LINE COMPANY, INC.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, ANDERSON DIVISION
CASE NO. 8:16-cv-04003-HMH

SUPPLEMENTAL BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, ASSOCIATION OF OIL PIPE LINES, AND AMERICAN PETROLEUM INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Case Materials

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are the Chamber of Commerce of the United States of America, American Fuel & Petrochemical Manufacturers, Association of Oil Pipe Lines, and American Petroleum Institute. Their members are subject to the Clean Water Act ("CWA" or "Act") and other federal and state environmental laws and regulations. *Amici* have an interest in the uniform interpretation and application of the Act's point source program and the Act's interaction with other federal and state environmental laws.

INTRODUCTION

In *County of Maui*, the Supreme Court introduced a new test—not previously applied by this Court—for determining whether a discharge falls within the Act's point source program. The Court rejected, together with several other tests, the theory Plaintiffs advanced, that the Act regulates a discharge from a point source to groundwater with a hydrological connection to navigable waters. Instead, the Court held that the Act requires a permit only "when there is a direct discharge from a point source into navigable waters or when there is the *functional*

[1] This brief was submitted with a motion for leave to file pursuant to Federal Rule of Appellate Procedure 29(b). No counsel for a party authored this brief in whole or in part, and no party or their counsel or any person other than *amici*, their members, or their counsel contributed money that was intended to fund the preparation or submission of this brief.

equivalent of a direct discharge." *Cty. of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1476 (April 23, 2020) (emphasis in original).

The Court placed significant limitations on its new "functional equivalent" test. First, the test should not "undermin[e] state regulation of groundwater." *Id.* at 1477. Second, the Court made clear that the test is a narrow exception to the general proposition that the Act does not regulate groundwater, by declaring that it should not result in any "unmanageable expansion" of NPDES jurisdiction. *Id*. Third, the "functional equivalent" of a direct discharge must "reach[] the same result" as a direct discharge to navigable water through means that are "roughly similar" to a point source conveyance. *Id.* at 1476.

County of Maui's "functional equivalent" test does not require a permit for the discharge alleged by Plaintiffs because requiring so would not advance the Act's statutory purposes, as the Supreme Court has instructed. It would displace South Carolina's active regulation of groundwater pollution and ongoing work to remediate it. And overlaying a federal permit requirement is not needed to avoid "creating loopholes that undermine the statute's basic federal regulatory objectives." *Id.* at 1477. Those facts alone should decide this case.

But even if this Court determined that other factors must be considered, it does not have a sufficient record to do so. At a minimum, therefore, the Court should remand to the district court for proceedings consistent with *County of Maui*.

ARGUMENT

I. *County of Maui*'s "Functional Equivalent" Test Is Not Satisfied Here As Requiring A Federal Permit Would Not Advance The Act's Statutory Objectives.

In *County of Maui*, the Supreme Court interpreted the statutory term "discharge of a pollutant" to determine "whether the Act requires a permit when pollutants are conveyed to navigable waters by a nonpoint source, here, groundwater." 140 S. Ct. at 1468. The Court rejected the tests for liability adopted by the Ninth Circuit (if pollution is "fairly traceable" to a point source) and proposed by the citizen group respondents (if point source is the "proximate cause" of pollution in navigable waters). The Court also rejected EPA's position below (if point source discharges to groundwater have "direct hydrological connection" to navigable waters). All these interpretations were overly broad and "inconsistent with major congressional objectives, as revealed by the statute's language, structure, and purposes." *Id.* at 1470-77. Specifically, "the structure of the Act indicates that, as to groundwater pollution . . . , Congress intended to leave substantial responsibility and autonomy to the States." *Id.* at 1471.

The "functional equivalent" test is not satisfied here because requiring a federal permit would not advance the "underlying statutory objectives." *Id.* at 1477. "The object in a given scenario will be to advance, in a manner consistent with the statute's language, the statutory purposes that Congress sought to

achieve." *Id.* at 1476. Thus, "[d]ecisions should not create serious risks either of undermining state regulation of groundwater or of creating loopholes that undermine the statute's basic federal regulatory objectives." *Id.* at 1477. The opposite is true here. A federal permit here *would* undermine state regulation of groundwater and *is not needed* to avoid a loophole.

First, South Carolina has implemented regulations to protect groundwater independent of the NPDES permitting regime.[2] These state laws prohibit the discharge of pollutants into ***any*** state waters, surface or ground, and provide for separate enforcement authority. *See, e.g.,* S.C. Code Ann. §§ 48-1-10, *et seq*.[3] Critically, the South Carolina Department of Health and Environmental Control ("DHEC") took action under these laws to address the spill and require Plaintiffs to remediate its effects—including the impacts on the alleged navigable waters.[4] In

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[2] *See* Br. of *Amici Curiae* the State of West Virginia et al., *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, No. 17-1640 (4th Cir. Sept. 8, 2017) (Doc. 55-1) ("South Carolina *Amicus* Br."), at 22-23.

[3] In addition to state regulations, other federal programs regulate releases of pollutants to groundwater. These federal programs include the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601, *et seq.*, the Safe Drinking Water Act, 42 U.S.C. §§ 300f, *et seq.*, the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901, *et seq*., and the Oil Pollution Control Act, 33 U.S.C. §§ 2701 *et seq.* Because of this overlay of state and federal law, there is no danger of creating a "loophole" by determining that no NPDES permit is required in this case.

[4] *See* Resp. Br. of Defs.-Appellees, *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, No. 17-1640 (4th Cir. Sept. 1, 2017) (Doc. 43) ("Resp. Br."), at 2; South Carolina *Amicus* Br. at 22.

short, there is an extensive state regulatory and remedial program that applies to the groundwater pollution here, as well as directly relevant state agency action.

Second, the Supreme Court created the "functional equivalent" test out of concern over a limited set of circumstances not present here, such as where a regulatory gap could allow a discharger to evade regulation by "simply mov[ing] the pipe back, perhaps only a few yards, so that the pollution must travel through at least some groundwater" before reaching navigable waters. *County of Maui*, 140 S. Ct. at 1473. To plug this "large and obvious loophole," the Court fashioned a narrow exception to the Act's limitation of the NPDES program to direct discharges only, extending permitting requirements to the "*functional equivalent of a direct discharge*." *Id*. at 1473, 1476 (emphasis in original). The alleged discharge at issue is nothing like an ongoing discharge from a pipe moved a few yards back—it is the result of a one-time, accidental subsurface release from a leaking pipe, which was repaired immediately upon discovery. *See* Resp. Br. at 2.

II. On This Record, The Court Has An Insufficient Basis To Apply The Multi-factor Balancing Test For Determining The "Functional Equivalent" Of A Direct Discharge.

Even if this Court chose to evaluate each of the factors set forth in *County of Maui's* "functional equivalent" test (despite South Carolina's active regulation of the very pollution at issue), the record before the Court lacks the information needed for such an evaluation.

A discharge is the "functional equivalent" of a direct discharge only "when the discharge reaches the *same result*" as a direct discharge "through *roughly similar* means" to a point source conveyance. *County of Maui*, 140 S. Ct. at 1476 (emphasis added). Thus, "[w]hether pollutants that arrive at navigable waters after traveling through groundwater are 'from' a point source depends upon how similar to (or different from) the particular discharge is to a direct discharge" from a point source. *Id*.

The Supreme Court set forth only "*some* of the factors that *may* prove relevant" in any given case: (1) transit time; (2) distance traveled; (3) the nature of the material through which the pollutant travels; (4) the extent to which the pollutant is diluted or chemically changed as it travels; (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source; (6) the manner by or area in which the pollutant enters the navigable waters; and (7) the degree to which the pollution (at that point) has maintained its specific identity. *Id*. at 1476-77 (emphasis added).

The case must be remanded to the district court for full factual development before any court attempts to apply these factors. First, the case is before the Court upon appeal of an order granting a motion to dismiss. The record therefore does not speak to most of the *County of Maui* factors. The pleadings in the record do not allege specific facts on: (1) transit time; (2) the nature of the material through

which the pollutant travels; (3) the extent to which the pollutant is diluted or chemically changed as it travels; (4) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source; (5) the manner by or area in which the pollutant enters the navigable waters; and (6) the degree to which the pollution (at that point) has maintained its specific identity.[5] Second, the "functional equivalent" test represents a classic multi-factor balancing test, in which no factor (or combination of factors) is dispositive, or even creates a presumption. *Id.* at 1477. Third, the Supreme Court's multi-factor test is non-exclusive. The enumerated factors are merely "some" that "may prove relevant." *Id.* at 1476. For example, applying NPDES permitting to a pipeline spill to groundwater would present substantial practical challenges that counsel against treating such spills as the functional equivalent of a direct discharge to navigable waters, particularly given that the permit is designed for anticipated discharges, not an unintended incident. The district court will need factual development to determine whether other factors are relevant to this particular situation. For all these reasons, it would be inappropriate for the Court to evaluate each of the *County of Maui* factors on this record. At a minimum, the Court should remand to

[5] Although the pleadings contain an allegation about distance, this Court has no context in which to evaluate it. *County of Maui's* guidance for evaluating distance—i.e., to inform the determination whether "the discharge reaches the *same result* through *roughly similar* means," 140 S. Ct. at 1476 (emphasis added)—requires further factual development for evaluation.

the district court for full factual development under *County of Maui* and, if necessary, application of these and other relevant factors in the first instance.

CONCLUSION

The Court should affirm the district court's dismissal of the case, or in the alternative, remand to the district court.

Dated: July 1, 2020

Respectfully submitted,

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APPENDIX: DESCRIPTION OF *AMICI CURIAE*

Amici represent a broad cross-section of the economy with members that are often subject to the requirements of the CWA. 33 U.S.C. §§ 1251 *et seq.*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional 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 that raise issues of concern to the nation's business community.

American Fuel & Petrochemical Manufacturers ("AFPM") is a national trade association whose members comprise most United States refining and petrochemical manufacturing capacity. AFPM's members supply customers with a wide variety of products that Americans use daily in their homes and businesses. AFPM's members meet the Nation's fuel and petrochemical needs, strengthen economic and national security, and support nearly three million jobs.

Association of Oil Pipe Lines ("AOPL") is a nonprofit national trade association that represents the interests of oil pipeline owners and operators before

the judiciary, regulatory agencies, and legislative bodies. AOPL's members operate pipelines that carry approximately 97% of the crude oil and petroleum products moved by pipeline in the United States, extending over 208,000 miles in total length. These pipelines safely, efficiently, and reliably deliver approximately 21 billion barrels of crude oil and petroleum product 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 products by pipeline as the safest, most reliable, and most cost-effective method.

American Petroleum Institute ("API") is a national trade association that represents all aspects of America's oil and natural gas industry. API's more than 600 corporate members, from the largest major oil company to the smallest of independents, come from all segments of the industry. 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, including standards and recommended practices incorporated or referenced in numerous state and federal regulations. API represents the oil and natural gas industry to the public, Congress, the Executive Branch of the Federal Government, state governments, and to the media.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPEARANCE OF COUNSEL FORM

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