No. 17-1640

IN THE 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, Honorable Henry M. Herlong, Jr.

BRIEF OF AMICI CURIAE THE STATE OF WEST VIRGINIA, THE STATE OF SOUTH CAROLINA, NINE OTHER STATES, AND THE GOVERNOR OF MISSISSIPPI SUPPORTING DEFENDANTS-APPELLEES AND AFFIRMANCE

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INTEREST AND IDENTITY OF *AMICI*

The States of West Virginia, South Carolina, Arkansas, Alabama, Indiana, Kansas, Louisiana, Missouri, Oklahoma, Utah, Wisconsin, and the Governor of the State of Mississippi file this brief under Rule 29(a) of the Federal Rules of Appellate Procedure.[1]

Amici States have a significant interest in the outcome of this case, because the result Appellants Upstate Forever and Savannah Riverkeeper seek—an unprecedented and unwarranted expansion of federal jurisdiction and the National Pollutant Discharge Elimination System ("NPDES") permitting regime under the Clean Water Act ("CWA")—would undermine the cooperative federalism structure on which the CWA is premised while introducing significant complexity and costs into the States' water-quality efforts under both the CWA and independent state laws.

Amici States appreciate the importance of protecting state and national waters, and have long exercised their traditional authority to regulate in this sphere. Under the CWA, States retain responsibility and jurisdiction over land and water resource protection, and are often at the tip of the corrective action spear when enforcement of state and federal environmental laws and supervision of cleanup and mitigation efforts is required. *Amici* believe, however, that judicially expanding the scope of

[1] A State may "file an amicus-curiae brief without the consent of the parties or leave of court." Fed. R. App. P. 29(a).

the NPDES regime as Appellants urge would violate the CWA's text and, contrary to Congress's intent, erode the States' role as the principal regulators and protectors of local land and water resources. Moreover, *amici* are concerned that the result of this federal jurisdictional creep will not be more aggressive environmental cleanup actions, but rather an unwarranted expansion of the NPDES program—with its costly and time-consuming requirements—to scores of new lands and water sources that the program was not designed to address. Navigating these complexities will exponentially increase costs and administrative burdens on States and their agencies tasked with implementing state and federal environmental laws without materially improving environmental quality. In turn, these burdens could divert resources from existing state enforcement efforts and emergency clean-up measures, while opening the States to the specter of liability from a plethora of new citizen suits seeking enforcement of these new, atextual duties.

INTRODUCTION

In the CWA, Congress struck a balance between state and federal environmental enforcement in a cooperative effort to protect the nation's waterways. The CWA prohibits discharges from discrete "point sources" like pipelines into waters of the United States, but leaves to the States regulation of other, nonpoint source pollution that affects state waters. The oil leak at issue here occurred on intrastate land, with some pollutants—eventually and indirectly—making their way to waters

of the United States by seeping into the ground and migrating through the groundwater. Under the plain text of the statute, the CWA does not apply.

Nevertheless, Appellants seek an end-run around the statutory text by trying to persuade this Court to adopt what Congress has declined to do—and by advancing an expansive theory of CWA jurisdiction at the same time that the EPA is actively reconsidering expansive jurisdictional theories adopted by the prior administration. Appellants' "hydrological connection" theory is unsupported by the text and would lead to limitless expansion of federal jurisdiction, effectively erasing the distinctions between state and federal authority that are baked into the CWA's very structure.

Further, expanding the CWA's scope as Appellants urge would introduce unwarranted complications and complexities as States try to administer a behemoth of new regulatory duties. The uncertainties endemic to this approach would make it impossible for States to regulate with certainty in these new areas, and could drain resources from other environmental and water-quality programs that play a vital role in protecting the nation's natural resources. Finally, there is no need for this dramatic expansion of CWA jurisdiction, because both the federal government and the States already have broad and sufficient authority to remedy accidental spills like this, as well as other threats to groundwater and intrastate resources.

This Court should not open the way for countless citizen suits, like this one, that will do nothing more than second-guess States' environmental remedial efforts

while multiplying administrative burdens for the States, compounding uncertainties for regulated entities in an already complex area, and rendering the States less equipped to enforce existing environmental laws.

ARGUMENT

I. The Hydrological Connection Theory Of CWA Jurisdiction Violates The CWA's Text And Principles Of Cooperative Federalism.

A. In the CWA, Congress granted limited authority to federal agencies to regulate the discharge of pollutants into "navigable waters," or "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). Specifically, the CWA makes unlawful "the discharge of any pollutant" without an NPDES permit. 33 U.S.C. § 1311(a). Under the CWA, pollution either emanates from a "point source" to navigable waters, in which case an NPDES permit is required, or is non-point source pollution, which requires no permit. *See* 33 U.S.C. § 1362(12) (defining "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source"). A "point source," in turn, is defined as "any discernible, confined and discrete conveyance," and includes (but is not limited to) pipes, ditches, channels, tunnels, and similar conduits. 33 U.S.C. § 1362(14). While the CWA also prohibits indirect discharges into navigable waters, those discharges must proceed from one distinct point source (*i.e.*, a pipe) into another (*i.e.*, a drainage ditch), which is designed or intended to flow into navigable waters. *See*, *e.g.*, *Rapanos v. United States*, 547 U.S. 715, 743 (2006) (plurality opinion) (collecting authorities).

Appellants brought this challenge under the CWA's citizen-suit provision, which allows individuals to bring a lawsuit against any person for designated CWA violations, including violations of NPDES permitting standards. 33 U.S.C. § 1365(a)(1). Appellants allege that petroleum and other pollutants released at the spill site constituted an unlawful point source discharge; even though the oil leaked into the ground, not into navigable waters, Appellants argue it is enough that some pollutants eventually made their way to navigable waters through the groundwater. Appellants do not suggest that groundwater itself constitutes navigable waters. *See* Appellants Br. 18-19. Nor could they: "It is basic science that ground water is widely diffused by saturation within the crevices of underground rocks and soil," and "[a]bsent exceptional proof of something akin to a mythical Styx-like subterranean river," "passive migration of pollutants" through groundwater is not discharge from a point source. *26 Crown Assocs., LLC v. Greater New Haven Reg'l Water Pollution Control Auth.*, 2017 WL 2960506, at *8 (D. Conn. July 11, 2017).

Instead, Appellants argue that the distance between the spill site and the nearest navigable waters does not take this case outside the CWA's purview because the groundwater is purportedly "hydrologically connected" to waters of the United States. Either, the argument goes, the flows, seeps, and fissures through which

groundwater migrates are *themselves* point sources, or the CWA should be interpreted to include groundwater that is connected to navigable waters in the sense that the groundwater eventually flows into them.

Amici States agree with and incorporate by reference Kinder Morgan's legal arguments showing that the CWA cannot support either interpretation. Appellees Br. 31-45; *see also, e.g.*, *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994) ("The possibility of a hydrological connection" is not "a sufficient ground of regulation."). As the district court correctly concluded, either prong of the hydrological connection theory would run counter to the text of the CWA and undermine the purposes and structure of the statute.

Essentially, Appellants are asking this Court for an end-run on the jurisdictional limits embedded in the CWA's text. Appellants (at 21-22) take cover in a position that the EPA has advanced in recent years, most prominently in an amicus brief in May 2016 in a still-pending Ninth Circuit case, in which it argued that the CWA requires regulation of groundwater with a direct hydrological connection to navigable waters. *See* Dkt. No. 40, Case No. 15-17447, *Hawaii Wildlife Fund et al. v. Cnty. Of Maui* (9th Cir. 2016). This litigation position, however, has never been subjected to rigorous notice-and-comment review, and thus, is owed no deference. *See Christensen v. Harris Cty*, 529 U.S. 576, 587 (2000).

Moreover, the EPA has recently made clear that it intends to engage in rule-making that suggests that the current administration would reconsider that position. *See* 82 Fed. Reg. 34,899 (July 27, 2017). The EPA's proposed rule expressly recognizes the need to balance the CWA's goals to "restore and maintain" integrity of the nation's waters with the need to "recognize, preserve, and protect the primary responsibilities and right of States to prevent, reduce, and eliminate pollution." *Id.* at 34,901 (citing 33 U.S.C. § 101(a)-(b)). It also announced the EPA's intention to "conduct a separate notice and comment rulemaking that will consider developing a new definition of 'waters of the United States' taking into consideration the principles that Justice Scalia outlined in the *Rapanos* plurality opinion," *id.* at 34,902—that is, that navigable waters under the CWA include only "relatively permanent, standing or continuously flowing bodies of water" that are connected to traditional navigable waters and wetlands with a "continuous surface connection" to such waters. *Rapanos*, 547 U.S. at 739, 742 (opinion of Scalia, J.). This proposed rulemaking signals the EPA's intent to leave no room for a theory that the definition of "waters of the United States" or the related definition of "point source" could encompass groundwater with a mere hydrological connection to navigable waters.

Further, the hydrological connection approach is an infinitely elastic theory that would lead to regulating any land capable of absorbing water—essentially, any land within a State. Groundwater naturally migrates downhill, but that is hardly the

same thing as traveling through a "confined and discrete conveyance" akin to a pipe, tunnel, or aqueduct. And because it is more likely than not that groundwater will, at some point, connect with navigable waters, reading a hydrological connection gloss onto the CWA could lead to a limitless expansion of federal power by requiring NPDES permits wherever groundwater eventually connects with navigable waters. In *Rapanos*, a plurality of the Supreme Court emphasized that the "plain language of the [CWA] simply does not authorize [a] 'Land is Waters' approach to federal jurisdiction." 547 U.S. at 734 (opinion of Scalia, J.). And, while *amici* States do not agree with his approach, Justice Kennedy in his concurring opinion underscored that waters adjacent to navigable waters may fall under the CWA only where there is a "significant nexus" between them. *Id.* at 767 (Kennedy, J., concurring in the judgment). *Both* approaches are adamant that there is a meaningful statutory distinction between waters that are—and are not—subject to the CWA. *See*, *e.g.*, *id.* ("Absent a significant nexus, jurisdiction under the Act is lacking."). Appellants' approach would all-but erase that distinction.

B. More fundamentally, the hydrological connection theory would expand federal authority at the expense of the States' traditional power to regulate state waters, in ways that the text of the CWA does not support and Congress did not intend.

The Tenth Amendment reserves all powers not delegated to the United States by the Constitution to "the States respectively, or to the people." U.S. Const. amend.

X. State authority to regulate and manage local lands and waters is a core sovereign interest; indeed, it "is perhaps the quintessential state activity." *FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982). Consistent with this principle, Congress enacted the CWA with respect for States' inherent powers over local lands and water resources by limiting the Act's scope to "waters of the United States." *See* 33 U.S.C. § 1362(7), (12). Congress also expressly stated its purpose to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . . of land and water resources." 33 U.S.C. § 1251(b). This delineation of responsibilities between the States and the federal government is a classic exercise in cooperative federalism: The federal government relies on experts at the state level to make the primary judgments about how best to ensure local water quality and to monitor compliance with those requirements.

The Supreme Court has similarly recognized that the States' "traditional and primary power of land and water use" requires a precise reading of the CWA: To expand the scope of the Act beyond its textual limits would "alter[] the federal-state framework by permitting federal encroachment upon a traditional state power" and raise "significant constitutional questions" about the validity of the CWA. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-74 (2001). Indeed, Justice Scalia's plurality opinion in *Rapanos* rejected an expansive reading of the CWA that would have authorized the federal government "to function

as a *de facto* regulator of immense stretches of intrastate land," because such "an unprecedented intrusion into traditional state authority" requires a "clear and manifest statement from Congress." *Rapanos*, 547 U.S. at 738 (opinion of Scalia, J.) (citation omitted). The phrase, "waters of the United States" "hardly qualifies." *Id.*

Even the EPA has recognized that safeguarding state authority to manage lands and waters is one of its primary goals in administering the CWA: The EPA emphasized that the CWA "commands the [EPA] to pursue two policy goals simultaneously: (a) To restore and maintain the nation's waters; and (b) *to preserve the States' primary responsibility and right to prevent, reduce, and eliminate pollution*." 82 Fed. Reg. at 34900 (emphasis added).

The position Appellants advocate would fundamentally alter this cooperative federalism regime. Instead of relying on States to regulate groundwater and nonpoint source pollution, the hydrological connection approach would dramatically expand the scope of the NPDES permitting regime and the States' obligations under it. Respecting the balance of roles and policy goals that Congress chose in the CWA is the best way to ensure strong environmental-protection programs at both the state and federal levels. *See, e.g.*, *Catskill Mountains Ch. of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 514 (2d Cir. 2017) (the CWA "balances a welter of . . . goals, establishing

a complicated scheme of federal regulation employing both federal and state implementation and supplemental state regulation. In this regard, the Act largely preserves states' traditional authority over water allocation and use . . . ." (citations omitted)).

II. The Hydrological Connection Theory Would Be Unworkable In Practice And Would Put An Untenable Strain On State Resources.

There is good reason not to upset the CWA's careful balance between state and federal powers: Extending the NPDES program to include discharges of pollutants to soils that are merely "hydrologically connected" to navigable waters would entail a myriad of practical difficulties; require States to take on significant new regulatory costs at the expense of existing, better tailored environmental-protection programs; and further multiply the confusion that has long plagued CWA enforcement for regulators and citizens alike.

A. State NPDES programs do not currently offer permits for nonpoint source pollution, nor are these programs designed to do so. Expanding CWA liability to groundwater and nonpoint source pollution would accordingly require a dramatic expansion of state NPDES programs beyond discharges from discrete conveyances, to the entire network of underground capillaries that ultimately lead to navigable waters—or else put States at risk of having the EPA revoke their authority to issue NPDES permits altogether. *See* 33 U.S.C. § 1342(c)(3). The problem, however, is that States cannot complete that new NPDES permitting task with any certainty, and certainly not without considerable, unjustifiable cost.

NPDES permits issued by authorized state agencies contain precise discharge limits from specific point sources into covered waters. Compliance with the terms of a permit becomes the prerequisite for avoiding liability. *See, e.g.*, 33 U.S.C. §§ 1311(a), 1342. Yet the degree of precision necessary to draft and comply with permits would be near-impossible to replicate in the context of groundwater. It is one thing, for example, to issue a meaningful permit regulating discharges from a pipe into navigable waters, but how would a state agency issue a permit for a "flow[]," a "seep[]," or a "fissure[]," as Appellants' theory would require? *See* Appellants Br. 7. Or as an oil plume migrates through state lands, would a permit need to be constantly amended? Where would the monitoring outfalls be placed along the groundwater's route to ensure compliance, and how many would be required to account for the full depth and breadth of seepage as pollutants move through the ground?

Groundwater may or may not seep through many feet of soil—and take multiple directions—before ultimately reaching surface water, and the direction and speed of flow depends on geography and gravity, not design. These factors would make it extremely challenging to draft a permit with precise discharge parameters, much less to monitor compliance. At a minimum, States could be required (at great cost) to undertake significant environmental impact studies into the many newly covered sources of pollution in an attempt to develop data sufficient to regulate with

any kind of precision, coherence, and scientific integrity under the strictures of the NPDES program.

The implications of Appellants' theory could also radiate far beyond the parties in this appeal to encompass many new sources of nonpoint source pollution that have never been considered covered by the CWA—and States would likely be required to permit and monitor all of them.

For example, personal septic tanks typically discharge pollutants into groundwater, but their owners have not historically had to apply for NPDES permits. If this Court sides with Appellants, however, the States could be required to issue permits (and individual homeowners required to apply for them) wherever the groundwater surrounding a septic tank is hydrologically connected to navigable waters. The potential scale of these new burdens is massive: The EPA estimates that 25% of American homes use septic systems that discharge more than 4 billion gallons of wastewater into the soil every day.[2] And the concern that septic tanks could become a new source for CWA litigation is not mere speculation, as the EPA has already received complaints arguing that States should be required to include septic tanks in their NPDES programs.[3]

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[2] *See* Envtl. Prot. Agency, *A Homeowner's Guide to Septic Systems* 5 (2005), *available at* https://www3.epa.gov/npdes/pubs/homeowner_guide_long.pdf.

[3] Envtl. Prot. Agency, *Initial Results of a Review of the National Pollutant Discharge Elimination System Program in the State of Minnesota*, at 5 (May 2013),

Similarly, owners of large parking lots could find themselves the subject of CWA citizen suits, because storm water mixes with petroleum products from cars parked on the pavement, and then the runoff makes its way into ditches and surrounding soil before seeping into the groundwater. So too for government agencies and municipalities that own stretches of roads. Just as with personal septic tanks, storm water runoff has also attracted attention as a potential source of NPDES liability under the CWA.[4] Adding the imprimatur of this Court to Appellants' theory could open the door to numerous citizen lawsuits. The same analysis could apply to untold other sources of potential liability—accident sites when a ruptured fuel tank causes a leak into groundwater, irrigation systems, underground storage tanks that spring a leak, sites undergoing state voluntary cleanup programs, and more.

B. The struggle to regulate this dramatically expanded realm of CWA permitting could place an untenable strain on the resources States devote to environ-

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available at https://www.epa.gov/sites/production/files/2017-04/documents/mn_petition_report_may-03-2013updated.pdf (alleging in part that Minnesota failed to establish and enforce an effective NPDES permitting program for over 55,000 septic systems).

[4] *See* Petition, Am. Rivers et al., Petition for a Determination that Stormwater Discharges from Commercial, Industrial, and Institutional Sites Contribute to Water Quality Standards Violation and Require Clean Water Act Permits (July 10, 2013), *available at* https://www.clf.org/wp-content/uploads/2013/07/RDA-Petition-WQS-Violations-REGION-I-FINAL-7-10-13.pdf.

mental protection. All told, the time and costs for States to administer NPDES permitting regimes and otherwise satisfy the requirements of the CWA already require an estimated $69 million in annual labor costs, and 1.6 million hours a year. *See* EPA ICR Supporting Statement, Information Collection Request for National Pollutant Discharge Elimination System (NPDES) Program (Renewal), OMB Control No. 2040-0004, EPA ICR No. 0229.21 at 17 tbl. 12.1 (Dec. 2015).

Further, even before managing the hundreds or thousands of new permitting applications States are likely to receive, States might be required to establish water quality standards ("WQS") for groundwater throughout a State based on its hydrological connection to navigable waters. Currently, States are required to establish WQS for each body of water that falls under the definition of "waters of the United States." *See* 33 U.S.C. §§ 1311(b)(1)(C), 1313(e)(3)(A); 40 C.F.R. §§ 130.3, 131.3(i), 131.4(a). Yet if a hydrological connection is enough to trigger CWA liability for discharges into groundwater, States may be required to expand their WQS programs as well, studying those "waters" to determine whether current standards should apply, or issuing new WQS altogether. *See* 33 U.S.C. § 1313(c)(4). States then have a continuing duty to revise their WQS as environmental conditions change, 33 U.S.C. § 1313(c)(3), and must submit biennial water quality reports to the EPA, 33 U.S.C. § 1315(b)(1)(A)-(B). If these duties were expanded to

potentially all of a State's groundwater, state compliance burdens would raise exponentially.

At bottom, States would have to devote astronomical resources from already scarce budgets to administer an accurate and timely NPDES permitting regime over all discharges into groundwater with a hydrological connection to navigable waters. This would not only be expensive, but it could also divert resources away from other state programs that, as discussed below, already protect state waters from groundwater and nonpoint source pollution. *See infra* Part III.B.

C. Finally, the difficulties of administering a hydrological connection theory of CWA jurisdiction would dramatically increase compliance costs for parties who seek to take steps to protect themselves from liability, and further complicate an already thorny and uncertain area of the law.

Unlike for discharges into a ditch, tunnel, or similarly discrete conveyance that leads to navigable waters, regulated parties do not have direct control over where, how long, and how far a discharge into groundwater may disperse. It would thus be extremely difficult for covered entities to take precautions to ensure that they meet prescribed NPDES permitting requirements for groundwater discharges. Appellants' theory could put States in the untenable position of administering an unwieldy and time-consuming permitting program that may prove challenging for even the most diligent parties to satisfy.

Given that essentially any groundwater may, eventually, make its way to navigable waters, individuals and companies may find it prudent to seek NPDES permits for essentially every discharge to state lands. This case illustrates the difficulties of such a proposition. Would the owners or operators of an oil pipeline be required to seek a permit everywhere the pipe runs, across county and often state lines, to protect against a potential mountain of citizen suits and the specter of the CWA's steep per-day penalties—up to $52,414, *see* 82 Fed. Reg. 3633, 3636 (Jan. 15, 2017)—in the event of a leak or other accidental discharge?

The Supreme Court recently emphasized how "arduous, expensive, and long" the process for obtaining permits for discharges into navigable waters can be. *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016). The process to obtain state permits for even straightforward point source discharges can already take several months and cost over $20,000.[5] Permits issued by the Army Corps of Engineers for more complex regimes—which may be more akin to the type of new regulated sources that could be swept in by Appellants' theory—can be greater still. There, the process to obtain an "individual" permit can take "788 days and

[5] *See, e.g.*, W. Va. Dep't. of Envtl. Prot., *National Pollutant Discharge Elimination System (NPDES) Individual Permits* (Sep. 7, 2017), http://www.dep.wv.gov/wwe/permit/individual/pages/default.aspx (explaining that individual NPDES permits can take up to six months and cost up to $15,000); Va. Dep't. of Envtl. Quality, *VPDES Permits, Fees, and Regulations* (Sep. 9, 2017), http://www.deq.virginia.gov/Programs/Water/PermittingCompliance/PollutionDischargeElimination/PermitsFees.aspx (explaining that state permits can cost up to $24,000).

$271,596," and even "more readily available 'general' permits," on average, take "313 days and $28,915 to complete." *Id.* at 1812. Here, where individuals and businesses may be required to seek permits for discharges into even indisputably non-navigable groundwater, these costs could skyrocket.

More generally, members of the Supreme Court have repeatedly raised the alarm about the uncertainty that has become endemic to CWA litigation. Already, the "systemic consequences" of the statute can be "crushing" "to landowners for even inadvertent violations." *Hawkes*, 136 S. Ct. at 1816 (Kennedy, J., concurring). And as Justice Alito explained, the CWA's reach is "notoriously unclear," where "[a]ny piece of land that is wet at least part of the year is in danger of being classified [as navigable waters]." *Sackett v. EPA*, 566 U.S. 120, 132 (2012) (Alito, J., concurring). Adopting a hydrological connection theory would go further still, making it likely that planned or accidental discharges onto any piece of land could trigger liability under the CWA.

III. Extending The CWA's Scope Is Unnecessary To Redress Groundwater Or Nonpoint Source Pollution And To Hold Negligent Actors Accountable.

Beyond the heavy costs of expanding the NPDES permitting regime to include discharges into groundwater that ultimately make their way to navigable waters, this Court should reject Appellants' position because there is no need to take this atextual leap. The NPDES structure is ill-suited to regulate discharges into groundwater, as

explained above, but numerous federal and state programs already exist that are better tailored to manage groundwater and nonpoint source pollution. State and federal regulators thus already have sufficient alternate means to ensure cleanup of spills and to hold negligent companies accountable for their actions. These existing laws and programs make Appellants' proposed jurisdictional creep—at the expense of the States' traditional and deeply entrenched authority to regulate ground waters—more unwarranted still. *See Catskill Mountains*, 846 F.3d at 529 (finding narrower interpretation of CWA reasonable in part because "several alternatives could regulate pollution . . . even in the absence of an NPDES permitting scheme").

A. On the federal side, the CWA is hardly the only statute to address accidental oil leaks and other groundwater pollution. The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), for example, grants federal authority to order removal of pollutants or other remedial action whenever any "hazardous substance is released or there is a substantial threat of such a release into the environment." *See* 42 U.S.C. § 9604(a)(1). Congress defined releases of hazardous substances extremely broadly in CERCLA. *See* 42 U.S.C. § 9601(22) ("The term 'release' means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment . . . ."). "Environment" is a similarly expansive term: Unlike in the CWA, it includes "navigable waters" *and* "any other surface water, *ground water*, drinking

water supply, *land surface,* or subsurface strata, or ambient air within the United States." 42 U.S.C. § 9601(8) (emphases added). In other words, CERCLA provides direct authority to mediate situations like these—an oil leak that was plugged before any pollutants that had seeped into the groundwater made their water to navigable waters—without the need to shoehorn the facts into the more narrow elements of a CWA action.

In other cases, the federal government may file a lawsuit under the Resource Conservation and Recovery Act ("RCRA") against "any person" when there is evidence that any handling or disposal of solid or hazardous waste, past or present, "may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6973(a). Congress designed RCRA to deal with situations in which environmental "regulatory schemes break down or have been circumvented," and "expressly intended that this and other language of the Act [would] close loopholes in environmental protection." *United States v. Waste Indus., Inc.*, 734 F.2d 159, 164-65 (4th Cir. 1984).

Indeed, the CWA itself addresses oil spills in a section separate from the NPDES regime. This section, which defines oil spills to include "leak[s]," 33 U.S.C. § 1321(a)(2), prohibits "discharges of oil or hazardous substances into or upon the navigable waters of the United States, [or] *adjoining shorelines*." 33 U.S.C. § 1321(b)(1) (emphasis added). Thus, unlike for purposes of the NPDES permitting

scheme, Section 1321 is not strictly limited to discharges into navigable waters themselves (*i.e.*, jurisdiction extends to spills on adjoining shorelines)—nor does it require that spills necessarily come from a point source. Congress thus chose to treat oil spills different from other discharges of pollutants into the nation's waters. This deliberate legislative choice undercuts Appellants' position that applying the NPDES provisions to nonpoint source pollution is necessary to close a loophole in the CWA that Congress could not have intended.

To be sure, individual citizens lack the ability to help enforce these statutes—Congress chose not to extend the citizen-suit provision to violations of Section 1321, for example, and gave the EPA full authority to enforce violations instead, *see*, *e.g.*, 33 U.S.C. § 1321(b)(6), (7). But those decisions by Congress reveal a conscious legislative choice that courts are bound to respect. Moreover, the existence of these federal regimes belies any claim that, without the expansive relief Appellants seek here, the federal government would be rendered helpless to address accidental oil leaks and similar threats to the environment.

B. At the state level, mechanisms to redress pollution of groundwater are even more abundant. Under the CWA, States establish total maximum daily loads ("TMDLs") to regulate pollutants in intrastate waters. *See*, *e.g.*, 33 U.S.C. § 1313(d)(1)(C). The EPA also provides States with information regarding "processes, procedures, and methods to control pollution" to help the States fulfill their

responsibility to regulate nonpoint source pollution within their borders. 33 U.S.C. § 1314(f). And the States expressly retain the "right" to expand their NPDES programs or to "adopt or enforce" other environmental standards—including for discharges into groundwater or nonpoint source pollution more generally—where they determine that the CWA is insufficient to protect state lands and waters. *See* 33 U.S.C. § 1370.

States have long exercised their authority to protect intrastate waters independent of the CWA as well. One powerful example of state water-protection laws at work is South Carolina's extensive, ongoing supervision of the very oil leak at issue here. Under the oversight of the South Carolina Department of Health and Environmental Control ("SCDHEC"), remediation efforts (which incorporated public feedback, *see* Appellants Br. 6), resulted in the removal of 209,000 gallons of pollutants from the spill site as of last spring. *See Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 2017 WL 2266875, at *1 (D.S.C. Apr. 20, 2017).

South Carolina law directly addresses accidental spills like the one here, making polluters liable for money damages in appropriate circumstances and granting SCDHEC broad authority to mandate and oversee remediation efforts.[6] South Carolina law is also clear that the existence of statutory protections for state waters does

[6] *See, e.g.*, S.C. Code § 48-1-90(A)(1) (making it "unlawful for a person, directly or indirectly, to throw, drain, run, *allow to seep*, or otherwise discharge into the environment of the State organic or inorganic matter" without a permit (emphasis

not limit other "rights existing in equity or under the common law or statutory law . . . to abate any pollution." S.C. Code § 48-1-240. Appellants cannot displace South Carolina's judgment regarding the appropriate methods to enforce and monitor ongoing cleanup at the spill site, nor the State's prerogative to protect its natural resources. *Cf. Piney Run Preservation v. Carroll County*, 523 F.3d 453, 459 (4th Cir. 2008) (CWA citizen suit inappropriate in the face of existing agency enforcement action, even where "the agency's prosecution strategy is less aggressive than [the citizen-plaintiff] would like or . . . it did not produce a completely satisfactory result").

Other States in this Circuit enforce similar laws, including—but not limited to—the following:

- In West Virginia, "[i]t is unlawful for any person," without a state permit, to "[a]llow sewage, industrial wastes or other wastes, or the effluent therefrom, produced by or emanating from any point source, to flow into the waters of this state." W. Va. Code Ann. § 22-11-8(b); *see also id.* § 22-11-3(23) (defining "water" to include "all water on or beneath the surface of the ground"). Similarly, the West Virginia Legislature

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added)); *id.* § 48-1-90(B)(1) (making polluters of state waters "liable to the State for the damages" where the discharge "damage[s] or destroy[s]" fish, wildlife, or plant life); S.C. Regs. 61-92 § 280.60 *et seq.* (requirements for "release response and corrective action" for "[o]wners and operators of petroleum or hazardous substance" underground storage tank systems).

requires the state Department of Environmental Protection to "establish maximum contaminant levels permitted for groundwater," which must "recognize *the degree to which groundwater is hydrologically connected with surface water* and other groundwater" and "*provide protection for such surface water* and other groundwater." *Id.* § 22-12-4(b)-(c) (emphases added).

- Maryland law prohibits the "discharge of any pollutant into the waters of this State," and defines "discharge" broadly to include "addition, introduction, leaking, spilling, or emitting of a pollutant," *or* placing "a pollutant in a location where the pollutant is likely to pollute." Md. Code Ann., Envir. §§ 9-101(b), 9-322.
- Virginia makes it "unlawful for any person to" "[d]ischarge into state waters . . . any noxious or deleterious substances," or to "[o]therwise alter the physical, chemical or biological properties of state waters and make them detrimental to the public health, or to animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses." Va. Code § 62.1-44.5(A)(1), (3); *see also id.* § 62.1-10(a) (defining "water" to include "all waters, on the surface and under the ground").

- In North Carolina, it is unlawful, without a permit, to "[c]ause or permit any waste, directly or indirectly, to be discharged to or in any manner intermixed with the waters of the State in violation of [applicable state] water quality standards." N.C. Gen. Stat. Ann. § 143-215.1(a)(6); *see also id.* § 143-212(6) (defining "waters" to include "any . . . body or accumulation of water, whether surface or underground").

These and other laws provide important regulatory checks on groundwater and nonpoint source pollution. There is thus no weight to Appellants' claim (at 9) that rewriting the CWA is necessary to avoid "rampant pollution" of state groundwater and the nation's waterways.

C. Where, as here, the States have taken up the mantle of protecting groundwater and nonpoint source pollution within their borders, it would be particularly inappropriate to undo the CWA's careful delineation of responsibility between the federal government and the States. Instead of aiding state and federal enforcement, Appellants' hydrological connection theory could interfere with the efficient operation of these and other existing state programs.

As this Court has recognized, "the primary authority for enforcement [under the CWA] rests with the state and federal governments," and citizen suits are "meant to supplement rather than to supplant government action." *Piney Run*, 523 F.3d at

456 (citation omitted). Citizens are accordingly "bar[red]" "from suing if the EPA or the State has already commenced, and is diligently prosecuting, an enforcement action." *Id.* (citation omitted); *see also Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 61 (1987) (holding that allowing citizens to seek penalties under the CWA that the EPA or "state enforcement authorities" "chose to forgo" would impermissibly "curtail[]" CWA enforcement discretion). This Court's concern about citizen suits improperly interfering with state oversight decisions applies with even more force here: There has been no enforcement action under the CWA, but that is because the CWA *does not apply*. Nevertheless, South Carolina is actively overseeing site remediation under the State's laws that *are* relevant. Consistent with the analysis of *Piney Run*, this Court should refuse to supplant South Carolina's ongoing corrective measures with a remedy that Appellants prefer.

That result is also consistent with Congress's judgment that the CWA citizen-suit provision must not be used to interfere with remedial efforts under more directly applicable environmental laws. CERCLA, for example, generally prohibits judicial review of government removal or remedial actions. *See* 42 U.S.C. § 9613(h). Courts have interpreted this "blunt withdrawal of federal jurisdiction," *N. Shore Gas Co. v. EPA*, 930 F.2d 1239, 1244 (7th Cir. 1991), to include citizen-suit provisions in non-CERCLA environmental laws, like the CWA. *See McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 331 (9th Cir. 1995) (holding that citizen-plaintiff's

"claims pertaining to discharge via seepage and pipes into [surface waters]" are "excluded from federal court jurisdiction" where any remedy would affect CERCLA remediation measures). Just as the CWA citizen-suit provision may not be contorted into a tool to delay, interfere with, or overlap with remediation efforts under CERCLA, the same concerns support the conclusion that it should it be used to second-guess and divert resources from a State's efforts to remediate groundwater or nonpoint source pollution.

In short, even if there were any basis in the text of the CWA to support Appellants' direct hydrological connection theory—and there is not—expanding the scope of the CWA would not meaningfully advance the States' and federal government's interests in protecting water sources and holding polluters accountable for their actions. The CWA's cooperative federalism structure, expressly reserving to the States their traditional authority to protect state waters, should continue running its course.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,228 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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I certify that on September 8, 2017, the foregoing document was served on counsel of record for all parties through the CM/ECF system. One paper copy of this brief will be sent to the Clerk of Court via Federal Express.

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