

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

**BRIEF OF ANDERSON COUNTY, SOUTH CAROLINA AS *AMICUS
CURIAE* IN SUPPORT OF PLAINTIFFS- APPELLANTS UPSTATE
FOREVER AND SAVANNAH RIVERKEEPER**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....1

STATEMENT OF COUNSEL.....2

STATEMENT OF AMICUS CURIAE.....3

ARGUMENT.....3

 A. The Petroleum Release is a Point Source.....3

 B. Hydrologic Connection to Surface Water.....8

 C. Importance of this Case to Anderson County.....9

CONCLUSION.....10

CERTIFICATE OF COMPLIANCE.....11

CERTIFICATE OF SERVICE.....12

TABLE OF AUTHORITIES

Cases

Greater Yellowstone Coal v. Larsen
641 F. Supp. 2d 1120, 1139 (D. Idaho).....8

Mylan Labs., Inc. v. Matkari
7 F. 3d 1130, 1134 (4th Cir. 1993).....5

Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC,
141 F. Supp. 3d 428 (M. D. N.C. 2015).....8

United States vs. Deaton
332 F. 3d 698, 707 (4th Cir. 2003).....5

Statutes

S. C. Code §§ 4-1-10; 4-9-610.....3

33 U.S.C. § 1251 (a).....7

33 U.S.C. § 1251 (a) (1).....7

Federal Rules of Civil Procedure

Federal Rules of Civil Procedure 12(b).....4- 5

STATEMENT OF COUNSEL

The *Amicus* Brief of Anderson County was authored by the County Attorney, Leon C. Harmon. Anderson County is not a party in the case before this Court. Anderson County has received no funds from a party or a party's counsel intended to fund preparation or submission of this *Amicus* Brief. Finally, no other person has contributed funds to Anderson County intended to fund preparation or submission of this *Amicus* Brief.

STATEMENT OF AMICUS CURIAE

Anderson County is one of forty-six (46) Counties in South Carolina. It is a body politic and corporate which is governed through a Council-Administrator form of government. *See* S.C. Code §§ 4-1-10; 4-9-610, *et. seq.*

Anderson County has a unique interest in this case. The petroleum release estimated at approximately 370,000 gallons, from a Plantation Pipe Line occurred within the unincorporated area of the County. The property of County citizens and water courses which flow within and through the County have been impacted and continue to be impacted by the release. Plantation Pipe Line crosses Anderson County on its path from Louisiana to the Washington, D.C. area. Therefore, it is important to the County that a timely and complete cleanup of the release occurs to protect the environment of the County and prevent further damage to citizens' property within the County.

The County Council expressed its concern regarding the release and cleanup efforts to date in Resolution 2016-048 approved in December 2016 (Exhibit A). The County Council has authorized its County Attorney to file this amicus brief.

ARGUMENT

A. The Petroleum Release Is a Point Source

A release of petroleum products into the environment occurred from a rupture of the Plantation Pipe Line that crosses Anderson County. The release of

an estimated 370,000 gallons, a large release by any standard, occurred in a rural area near Belton, South Carolina and was discovered by local citizens in December 2014. The release occurred within 1000 feet of Browns Creek and within 400 feet of Cupboard Creek. Both of these Creeks are within the Savannah River Basin and flow through Anderson County to reach the Savannah River. Petroleum products from the release had reached Browns Creek by January 2015 and continue to enter Browns Creek. Since approximately 209,000 gallons of petroleum product was recovered by late 2016, there remains approximately 161,000 gallons in the environment. Although the pipeline rupture has been repaired, there remains a source of petroleum products that continues to impact the water courses in Anderson County.

The District Court dismissed this case under Federal Rule of Civil Procedure (“FRCP”) 12(b) because there was not a point source of pollution to jurisdictional waters and because the Clean Water Act (“CWA”) does not apply to a discharge of pollution to groundwater that is hydrologically connected to surface water. It is the position of Anderson County that the District Court erred in dismissing the Conservation Groups Complaint under FRCP 12(b).

With regard to the issue of a point source of pollution, the District Court erred in the following respects:

1. The District Court concluded that “the Plaintiff’s must allege more than stating that pollutants ultimately may reach navigable waters.” District Ct. Op., p. 7. The Plaintiffs’ Complaint clearly alleges that petroleum pollutants had reached Browns Creek by January 2015 and that petroleum constituents have continued to be found in Browns Creek. Complaint, ¶’s 17-25, 27. These allegations, which must be taken as a true in FCRP 12(b) analysis, clearly indicate that petroleum contaminants are in the surface waters of Anderson County which ultimately reach the Savannah River. *Mylan Labs., Inc. v. Matkari*, 7 F. 3d 1130, 1134 (4th Cir. 1993). But for the rupture of the Plantation Pipe Line and the release of petroleum products into the environment, the petroleum pollutants would not have been found in Browns Creek. And of some significance, the petroleum products were found in Browns Creek immediately after discovery of the release. Moreover, Browns Creek is part of a tributary system that ultimately reaches the Savannah River. This Court has concluded that “[t]he power over navigable waters also carries with it authority to regulate nonnavigable waters when that regulation is necessary to achieve Congressional goals in protecting navigable waters.” *United States v. Deaton*, 332 F. 3d 698, 707 (4th Cir, 2003). Therefore, the Conservation Groups have alleged that petroleum pollutants have reached navigable waters, not that the pollutants “ultimately may” reach navigable waters. The District Court erred in this conclusion.

2. The District Court concluded that “there is no continuing discharge from the pipeline and that the Plaintiffs have failed to allege any facts to support the position that the pipeline discharged petroleum directly into navigable waters.” District Ct. Op., p 7. Is it true that the pipeline rupture was repaired and that the petroleum pollutants do not continue to enter the environment directly from the pipeline. However, there remains approximately 161,000 gallons of petroleum product as a source from the release which results in a continuing violation since petroleum contaminants continue to enter the surface waters of Anderson County.

In addition, there are allegations in the Complaint that immediately following the discovery of the release, petroleum products were found in Browns Creek and continue to be found in Browns Creek. Complaint, ¶s 17-25, 27. To carry the District Court’s rationale to its logical conclusion, in order for a point source to exist from a petroleum pipeline for purposes of the CWA, a rupture must occur where the pipeline crosses the water course and the pipeline discharge must fall directly into the water course. This is difficult to square with the reality in this case that Browns Creek within a month of discovery of the release became polluted with petroleum products just as it would have if the pipeline ruptured where it crosses Browns Creek. The consequences of both are the same - a contaminated water course. Yet in one liability would arise and in the other there is no CWA liability. This clearly seems at odds with the purpose of the CWA, which is to “restore and maintain the chemical,

physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251 (a). In order to accomplish this purpose Congress established as one goal of the Act "that the discharge of pollutants into the navigable waters be eliminated by 1985." 33 U.S.C. §1251 (a) (1). It is certainly at odds with the purpose of the CWA to conclude that petroleum contamination from a pipeline spill must fall directly into the water course for the polluter to be liable under the CWA.

The District Court concluded that "the pipeline leaked petroleum into the ground and the contaminants are migrating through the soil and groundwater at the spill site." District Ct. Op., p. 8. The District Court further concluded that CWA liability under this scenario would result in the CWA applying to every discharge into the soil and groundwater no matter its location. This is simply incorrect. If a discharge occurred into the soil and groundwater and was intercepted through remedial action by polluter, the contaminants may never reach surface waters. That is clearly not the case here where almost immediately there were contaminants in Browns Creek.

3. The District Court concluded that "Defendants have undertaken efforts to remediate the site[.]" and "[t]he soil and ground water is contaminated and allegedly migrating toward navigable waters." District Ct. Op., p. 10. Whether or not a defendant has taken remedial action has no bearing on CWA liability. Either the discharge is impacting jurisdictional waters or it is not. In this case there clearly

is an impact upon surface waters which are part of the Savannah River drainage basin. Moreover, the Complaint alleges that there is an impact upon jurisdictional waters, which must be taken as true for FRCP 12(b) analysis. Complaint, ¶¶ 16-25, 27.

B. Hydrologic Connection to Surface Waters

The District Court concluded that the CWA does not encompass the transport of contaminants via ground water to surface waters. (District Court opinion, pp 12-16). There may indeed be cases where groundwater transport of contaminants would not generate CWA liability. *See, e.g. Greater Yellowstone Coal v. Larsen*, 641 F. Supp. 2d 1120, 1139 (D. Idaho 2009). This is not that case.

In the case of *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428 (M. D. N.C. 2015), the District Court concluded that the discharge of pollutants to navigable surface waters via hydrologically connected groundwater, which serves as conduit between the point source and the navigable waters, was sufficient to assert CWA jurisdiction. *Id.* 141 F. Supp. 3d at 445. In reaching this conclusion, the Court indicated that it would not be sensible for the CWA to encompass a polluter who discharges via a pipe to navigable waters but not a polluter who dumps the same pollutants into a settling basin some distance short of the river that then allows pollutants to seep into the river through the groundwater. *Id.* This is

precisely the same physical phenomenon that is occurring in the case of petroleum pollution into Browns Creek.

It is clear that there is a hydrological connection in this case from the spill site to Browns Creek. If not, the contaminants would not have been able to almost immediately appear in Browns Creek as they most certainly have and continue to do so.

C. Importance of this Case to Anderson County

Anderson County's position is that this Court should reverse the District Court. The County believes its citizens, citizens groups, and local governments should be able to enforce the CWA where a pipeline spill has impacted surface waters which are jurisdictional waters. The CWA includes penalties and provides a way for community organizations, among others, to protect the local environment beyond or apart from what the state and federal government may do or what polluters may do.

Anderson County has a number of petroleum pipelines within its boundaries, some of which are now aging. Future releases may occur. Where a release impacts surface waters, the CWA should be an available tool for which relief can be sought. The ruling of the District Court is contrary to the basic purposes of the CWA and should be reversed.

CONCLUSION

For the reasons stated herein, Anderson County supports the efforts of the Conservation Groups to reverse the decision of the District Court.

Respectfully Submitted,

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July 19, 2017

CERTIFICATE OF COMPLIANCE

Pursuant to Fed R. App p.28.1 (e)(2) and 32 (a)(7)(b), the undersigned certifies that this brief has been prepared using fourteen point, proportionally spaced, serif typeface (Times New Roman). Excluding sections that do not count toward the word limit, the brief contains 1,720 words.

s/Leon C. Harmon
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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of July, 2017, the foregoing document was served on all parties or their counsel of record through the CM/ECF system at the email addresses indicated below.

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