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

MOTION OF AMERICAN PETROLEUM INSTITUTE, ASSOCIATION OF OIL PIPE LINES, GPA MIDSTREAM ASSOCIATION, AND TEXAS PIPELINE ASSOCIATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF DEFENDANTS-APPELLEES

David H. Coburn
Cynthia L. Taub
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

Counsel for Amici Curiae
American Petroleum Institute,
Association of Oil Pipe Lines, GPA
Midstream Association, and Texas
Pipeline Association

September 8, 2017

MOTION OF AMERICAN PETROLEUM INSTITUTE, ASSOCIATION OF OIL PIPE LINES, GPA MIDSTREAM ASSOCIATION, AND TEXAS PIPELINE ASSOCIATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF DEFENDANTS-APPELLEES

Pursuant to Fed. R. App. P. 29, *Amici Curiae* American Petroleum Institute, Association of Oil Pipe Lines, GPA Midstream Association, and Texas Pipeline Association ("*Amici*") respectfully move for leave to file a 5,594 word *amici curiae* brief in support of Defendants-Appellees Kinder Morgan Energy Partners L.P. and Plantation Pipe Line Company, Inc.

In support of this motion, *Amici* state as follows:

I. IDENTITY OF AMICI

API is a national trade association that represents all aspects of America's oil and natural gas industry. API's more than 640 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. Accredited by the American National Standards Institute, API has issued more than 500 consensus standards governing all segments of the 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.

AOPL is a nonprofit national trade association that represents the interests of liquid pipeline owners and operators before Congress, regulatory agencies, and the judiciary. Liquid pipelines bring crude oil to the nation's refineries and important petroleum products to communities, including all grades of gasoline, diesel, jet fuel, home heating oil, kerosene, propane, and biofuels. AOPL members also transport carbon dioxide to oil and natural gas fields, where it can be used efficiently to enhance production. AOPL's members operate pipelines that extend approximately 208,700 miles across the United States. These pipelines safely, efficiently, and reliably deliver approximately 18 billion barrels of crude oil and petroleum product each year, consistent with safety regulations implemented by U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration. 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.

GPA Midstream has served the U.S. energy industry since 1921 as an incorporated non-profit trade association. GPA Midstream is composed of close to 100 corporate members of all sizes that are engaged in the gathering and

processing of natural gas into merchantable pipeline gas, commonly referred to in the industry as "midstream activities." Such processing includes the removal of impurities from the raw gas stream produced at the wellhead, as well as the extraction for sale of natural gas liquid products ("NGLs") such as ethane, propane, butane and natural gasoline. GPA Midstream members account for more than 90 percent of the NGLs produced in the United States from natural gas processing. GPA Midstream's members also operate hundreds of thousands of miles of domestic gas gathering lines and are involved with storing, transporting, and marketing natural gas and NGLs.

Texas Pipeline Association ("TPA") is the largest and only state trade association in the country representing solely the interests of the intrastate pipeline network. TPA provides advocacy on issues related to pipeline safety, environmental regulations, taxation and legislation and is the primary resource for information regarding the Texas pipeline industry. Its approximately 50 member companies gather, process, treat, and transport natural gas and hazardous liquids through intrastate pipelines in Texas. Member companies work in partnership with state and federal regulatory agencies to ensure full compliance.

No person or entity other than *Amici* and its counsel authored the proposed amicus brief in whole or in part, and *Amici* exclusively have funded the preparation of the brief.

II. INTEREST OF AMICI

Amici request leave to participate in the "classic role of amicus curiae" in order to "assist[] in a case of general public interest, supplementing the efforts of counsel, and [to] draw[] the court's attention to" legal issues that could adversely impact *Amici*'s members. *Miller-Wohl Co., Inc. v. Comm'r of Labor & Indus. State of Montana*, 694 F.2d 203, 204 (9th Cir. 1982). *Amici's* participation will thus help to ensure "a complete and plenary presentation of difficult issues so that the court may reach a proper decision." *Alexander v. Hall*, 64 F.R.D. 152 (D.S.C. 1974) (citing *Robinson v. Lee*, 122 F. 1010 (C.C.D.S.C.1903), *affirmed*, 196 U.S. 64 (1904)).

Amici, which collectively represent entities that account for the vast majority of petroleum products transported by pipeline in the United States, request leave to file the proposed brief to make this Court aware of the industry's perspective on the issues raised by the Appellants. The issues before this Court have potential consequences well beyond the Parties currently involved – namely, the Court's ruling could bear on whether claims may be asserted against other pipeline companies, including *Amici's* members, to require them to obtain Clean Water Act ("CWA") Section 402 permits, known as National Pollutant Discharge Elimination System ("NPDES") permits, for thousands of miles of their pipelines and appurtenant facilities that are located throughout the United States. *Amici* and their

members do not agree with Appellants that oil and gas pipelines constitute a "point source" for which an NPDES permit is required. This litigation thus raises an issue "of general public interest" concerning the applicability of NPDES permitting requirements to such pipelines that to date have not been subject to such requirements. *Alexander*, 64 F.R.D. at 155 (citing *Williams v. Georgia*, 349 U.S. 375 (1955)). A ruling by this Court overturning the District Court's dismissal could prompt similar citizen suits against any one of *Amici*-member companies that operate facilities similar to those operated by the Appellees. An ultimate result could be that *Amici's* members are subject to NPDES permitting requirements for facilities that have never been deemed to be NPDES point sources in the 45-year history of the CWA. *Amici's* members could consequently be subject to significant federal liability, including potential CWA penalties. Thus, *Amici's* participation in this action is appropriate.

Amici and their members have expertise in the operation of the pipeline facilities of the sort that are directly at issue in this case, including the federal regulatory frameworks that are applicable to the operation of such facilities. *Amici* are also acutely aware of the impact that NPDES permitting requirements could have on the overall pipeline industry. Thus, *Amici's* proposed brief addresses the CWA issues raised by Appellants from the broader standpoint of the trade organizations that represent the vast majority of pipeline companies in the United

States. Accordingly, the proposed brief offers the Court "an essential voice of the affected [*Amici*] interest groups". *Animal Prot. Inst. v. Martin*, 06-cv-128, 2007 WL 647567, *1 (D. Me. Feb. 23, 2007).

Defendants-Appellees Kinder Morgan Energy Partners L.P. and Plantation Pipeline Company, Inc. consent to the filing of *Amici's* proposed *amicus curiae* brief. Appellants declined to consent to the filing of *Amici's* brief, requiring the filing of this motion.

WHEREFORE, *Amici* respectfully request that the Court grant this motion for leave to file, and accept for filing, the proposed *amici curiae* brief submitted for filing with this Court in the above-referenced appeal.

RESPECTFULLY SUBMITTED this 8th day of September, 2017.

/s/ Cynthia L. Taub
David H. Coburn
Cynthia L. Taub
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., NW
Washington, D.C. 20036
Telephone: (202) 429-3000
Facsimile: (202) 429-3902
dcoburn@steptoe.com
ctaub@steptoe.com

Counsel for Amici Curiae American Petroleum Institute, Association of Oil Pipe Lines, GPA Midstream Association, and Texas Pipeline Association

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 27, the undersigned certifies that this motion has been prepared using fourteen point, proportionally spaced, serif typeface (Times New Roman). Excluding sections that do not count toward the word limit, the motion contains 1,219 words.

/s/ Cynthia L. Taub
Cynthia L. Taub
STEPTOE & JOHNSON LLP

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September, 2017, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/s/ Cynthia L. Taub
Cynthia L. Taub
STEPTOE & JOHNSON LLP

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BRIEF OF *AMICI CURIAE* AMERICAN PETROLEUM INSTITUTE, ASSOCIATION OF OIL PIPE LINES, GPA MIDSTREAM ASSOCIATION, AND TEXAS PIPELINE ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLEES' BRIEF SEEKING AFFIRMANCE

David H. Coburn
Cynthia L. Taub
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

Counsel for Amici Curiae American Petroleum Institute, Association of Oil Pipe Lines, GPA Midstream Association, and Texas Pipeline Association

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 17-1640 Caption: Upstate Forever et al v. Kinder Morgan Energy Partners L.P., et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

American Petroleum Institute
(name of party/amicus)

who is Amicus Curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Cynthia L. Taub Date: September 8, 2017

Counsel for: American Petroleum Institute

CERTIFICATE OF SERVICE

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I certify that on September 8, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Cynthia L. Taub
(signature)

September 8, 2017
(date)

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Association of Oil Pipe Lines
(name of party/amicus)

who is Amicus Curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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Signature: /s/ Cynthia L. Taub Date: September 8, 2017

Counsel for: Association of Oil Pipe Lines

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No. 17-1640 Caption: Upstate Forever et al v. Kinder Morgan Energy Partners L.P., et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

GPA Midstream Association
(name of party/amicus)

who is Amicus Curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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Signature: /s/ Cynthia L. Taub Date: September 8, 2017

Counsel for: GPA Midstream Association

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No. 17-1640 Caption: Upstate Forever et al v. Kinder Morgan Energy Partners L.P., et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

Texas Pipeline Association
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STATEMENT OF COUNSEL

This *Amici* Brief was authored by Steptoe & Johnson LLP on behalf of *Amici*. *Amici* are not parties in the case before this Court. Steptoe & Johnson LLP has received no funds from a party or a party's counsel intended to fund preparation or submission of this *Amici* Brief. Finally, no other person has contributed funds to Steptoe & Johnson LLP intended to fund the preparation or submission of this *Amici* Brief. Steptoe & Johnson LLP is authorized by *Amici* to file this brief.

INTEREST OF THE *AMICI CURIAE*

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This case raises an issue of significance to each of the *Amici* because a decision in favor of Appellants could significantly expand the reach of the Clean Water Act ("CWA"), including its permitting requirements, beyond what the Act's terms require and Congress intended. Such a decision would potentially expose pipeline and other petroleum facility operators to unprecedented and burdensome CWA obligations and liabilities. Accordingly, *Amici* file this brief to provide further context and support for the District Court's holding that this case does not involve a point source discharge into a navigable water that is subject to CWA jurisdiction. Under Appellants' overbroad theory of CWA liability, *Amici's* members could be required to obtain CWA Section 402 permits, known as

National Pollutant Discharge Elimination System ("NPDES") permits, for activities that have never before been subject to such permitting. Under Appellants' theory, an NPDES permit could be mandated any time pollutants are released into soil or groundwater and eventually migrate to a navigable water, irrespective of mode, remoteness, or duration of migration. Such an interpretation is not supported by the CWA, which imposes liability only when "point sources" are the direct means by which pollutants reach navigable waters. Pollutants that reach navigable waters indirectly as the result of diffuse migration are addressed under nonpoint source control programs. Because all that is required under the Appellants' theory to trigger NPDES liability is the eventual migration of a pollutant—no matter how negligible—to a navigable water, hundreds of thousands of additional NPDES permits could potentially be required nationwide. Congress could not have intended such a result when it drew sharp and meaningful distinctions between point and nonpoint source pollution control throughout the CWA and preserved primary authority over land use and non-point discharges for state and local governments.

Appellants' theory would expose *Amici's* members to a new threat of federal CWA liability, including potentially substantial penalties.[1] By threatening to impose unprecedented liability to a wide swath of previously unpermitted sources, Appellants have raised arguments that directly impact the interests of *Amici's* members.

BACKGROUND

I. PIPELINES ARE A VITAL AND SAFE MODE OF ENERGY TRANSPORTATION

North America has an extensive pipeline system that safely and efficiently carries nearly 18 billion barrels of liquid petroleum products each year.[2] Pipelines play a vital role in safely and reliably transporting significant volumes of petroleum products throughout the United States and other destinations in North America. Pipelines enable "the safe movement of extraordinary quantities of

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[1] The CWA imposes substantial criminal and civil penalties for violations. "Knowing" criminal violations are punishable by up to $100,000 per violation per day and six years' imprisonment, while negligent criminal violations carry fines of up to $50,000 per violation per day and two years' imprisonment. 33 U.S.C. § 1319(c). Even first time criminal violations are punishable by fines of up to $50,000 per violation per day and three years' imprisonment (for knowing violations) or up to $25,000 per violation per day and one year in prison (for negligent violations). *See id*. Maximum civil penalties recently rose to $52,414 per violation per day. Civil Monetary Penalty Inflation Adjustment Rule, 82 Fed. Reg. 3633, 3636 (Jan. 12, 2017).

[2] *See* American Petroleum Institute and Association of Oil Pipe Lines, *2017 Annual Liquids Pipeline Report Pipeline Safety Excellence Performance Report & Strategic Plan 2017–2019*, p. 68, *available at*, http://www.aopl.org/wp-content/uploads/2017/04/2017-API-AOPL-Pipeline-Safety-Report_low-1.pdf.

energy products to industry and consumers, literally fueling our economy and way of life."[3]

The public benefits from U.S. pipeline systems are immeasurable. Pipelines enhance access to secure and reliable supplies of North American petroleum resources; reduce the nation's reliance on imports from nations that are less stable or unfriendly to U.S. interests; ensure refineries in the U.S. continue to be able to satisfy public demand for petroleum products; and generate millions of dollars of tax revenue for communities along the pipeline routes that provides funding for schools, roads and other community needs.

Pipelines are also a safe mode of energy transportation. In 2015, 99.999% of crude oil and petroleum product barrels delivered by transmission pipeline reached their destination safely.[4] In 2015, pipeline operators safely delivered over

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[3] *See* PHMSA, General Pipeline FAQs, *available at* https://www.phmsa.dot.gov/portal/site/PHMSA/menuitem.6f23687cf7b00b0f22e4c6962d9c8789/?vgnextoid=a62924cc45ea4110VgnVCM1000009ed07898RCRD&&_sm_au_=iHVHqjP572Wtvnqq (last updated Jan. 23, 2013).

[4] American Petroleum Institute and Association of Oil Pipe Lines, *2017 Annual Liquids Pipeline Report Pipeline Safety Excellence Performance Report & Strategic Plan 2017–2019*, p. 7, *available at* http://www.aopl.org/wp-content/uploads/2017/04/2017-API-AOPL-Pipeline-Safety-Report_low-1.pdf; PHMSA, Pipeline Incident 20 Year Trends, *available at* https://www.phmsa.dot.gov/pipeline/library/data-stats/pipelineincidenttrends (last visited July 17, 2017).

18 billion barrels of petroleum products by transmission pipeline.[5] For the rare "significant" pipeline incidents that occur,[6] most are totally contained on operator-controlled property, or are small in volume.[7]

Of course, the ultimate goal of the pipeline industry is to prevent all pipeline incidents. Towards that end, the industry is engaged in a number of initiatives to further improve pipeline safety.[8] Over the next three years, industry-wide teams will undertake or continue initiatives to: expand pipeline safety management practices through an industry-wide recommended practice ("RP") for pipeline

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[5] Total number of barrels delivered calculated by industry compilation of pipeline operating company submissions to FERC through *Form 6/6-Q - Annual/Quarterly Report of Oil Pipeline Companies*, *available at* https://www.ferc.gov/docs-filing/forms/form-6/data.asp.

[6] "Significant" incidents are those reported by pipeline operators when any of the following specifically defined consequences occur:

1. fatality or injury requiring in-patient hospitalization
2. $50,000 or more in total costs, measured in 1984 dollars;
3. highly volatile liquid releases of 5 barrels or more or other liquid releases of 50 barrels or more; or
4. liquid release resulting in an unintentional fire or explosion

PHMSA, *Pipeline Incident Flagged Files*, *available at* https://www.phmsa.dot.gov/pipeline/library/data-stats/flagged-data-files(last visited September 8, 2017).

[7] *See id.*; American Petroleum Institute and Association of Oil Pipe Lines, *2017 Annual Liquids Pipeline Report Pipeline Safety Excellence Performance Report & Strategic Plan 2017–2019*, p. 56-58, *available at* http://www.aopl.org/wp-content/uploads/2017/04/2017-API-AOPL-Pipeline-Safety-Report_low-1.pdf.

[8] American Petroleum Institute and Association of Oil Pipe Lines, *2017 Annual Liquids Pipeline Report Pipeline Safety Excellence Performance Report & Strategic Plan 2017–2019*, p. 16, *available at*, http://www.aopl.org/wp-content/uploads/2017/04/2017-API-AOPL-Pipeline-Safety-Report_low-1.pdf.

safety management systems, an RP for construction quality management system, and an updated RP for pipeline integrity management programs.[9] Industry-wide initiatives will also promote best safety practice sharing, improve pipeline integrity through technical data analysis, improve pipeline integrity inspection technology, enhance incident identification and response, boost operator and first responder response capabilities, improve stakeholder communication, and promote innovative approaches to enhancing damage prevention.[10]

These industry initiatives are in addition to the robust regulatory scheme already in place regarding pipeline safety and spill response, as discussed below.

II. PETROLEUM PRODUCT PIPELINES ARE SUBJECT TO EXTENSIVE REGULATION AND OVERSIGHT

The operation and maintenance of a liquid pipeline is regulated by PHMSA, pursuant to its authorization under the Pipeline Safety Act ("PSA"), 49 U.S.C. §§ 60101, *et seq.*[11] PHMSA's regulations govern pipeline operations, including design, specifications, operation, and maintenance. *See, e.g.*, 49 C.F.R. Part 195. PHMSA regulations, for example, dictate the design and material specifications for all segments of a pipeline (49 C.F.R. § 195.200, *et seq.*), and the pressures at which

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[9] *Id.* at 20.
[10] *Id.*
[11] Other agencies also contribute to the safety of our nation's pipeline system. In Texas, for example, the Railroad Commission of Texas has oversight over the network of intrastate pipelines and has been delegated authority by PHMSA to regulate intrastate and interstate pipeline safety in Texas.

such pipelines may be operated (49 C.F.R. § 195.406). The PHMSA regulations further establish the frequency with which operators must conduct internal and external investigations to identify potential integrity threats, including the timelines under which even *potential* threats must be inspected and repaired (49 C.F.R. § 195.452). PHMSA regulations further address releases, establishing the procedures under which an operator is to control a pipeline, including responding to alarms or triggers that may be indicative of a release (49 C.F.R. § 195.446); and the placement of valves that may be remotely closed to minimize a potential release (49 C.F.R. § 195.116).

Pipeline professionals work with PHMSA in ensuring safety and reliability. The PHMSA regulations incorporate consensus engineering standards, including those developed originally as an API standard or recommended practice.[12] PHMSA regulations address pipe and component manufacturing, shipping of manufactured pipe, construction techniques, operating procedures and operator training, emergency response, and, ultimately, abandonment at the end of the pipeline's economic life. PHMSA enforces these regulations by utilizing various inspection and enforcement processes, including civil penalties.

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[12] *See e.g.,* 49 C.F.R. § 195.591, incorporating by reference the requirements and recommendations of *API Std 1163, Inline Inspection Systems Qualification Standard (Aug. 2005).*

To respond to, contain, and minimize a release to the environment (should one occur), *Amici's* members are also subject to extensive emergency response planning requirements under the Oil Pollution Act ("OPA"), also administered by PHMSA for onshore pipelines. *See* 33 U.S.C. § 1321. In accordance with OPA, *Amici's* members prepare and implement comprehensive emergency response plan documents, which include hundreds of pages of procedures to respond to a release from regulated facilities, including pipelines, storage tanks, and vessels. These robust plans are designed to: (i) ensure that a release of oil is quickly contained; (ii) direct initial clean-up efforts to mitigate adverse consequences to natural resources; and (iii) establish procedures for coordinating with state and federal agencies regarding a long-term response effort. *See* 49 C.F.R. Part 194.

Should any release of oil into waters of the United States or "adjoining shorelines" result from a pipeline spill, the OPA establishes a liability framework whereby the Federal Government may seek civil or criminal penalties and impose injunctive measures. *See, e.g.*, 33 U.S.C. § 1321. The CWA, as amended by OPA, also sets forth requirements for owners and operators of facilities from which oil has been discharged to clean-up, remediate, and restore natural resources. Further, the CWA establishes the Oil Spill Liability Trust Fund, which provides local governments and the public with the ability to recover any damages or costs

(including natural resource damages) that may be incurred as a result of an oil release to waters of the U.S. or adjoining shorelines. *See* 33 C.F.R. Part 136.

In this case, the OPA was not triggered because the release was not into waters of the U.S. or adjoining shorelines. Instead, the event was subject to state jurisdiction. As set forth in the District Court's Opinion, the remediation of the release at issue in this case is being undertaken under the authority and oversight of the South Carolina Department of Health and Environmental Control ("SCDHEC"). *See, e.g.,* App. 411, 420 (Op. at 2 and n.4) (SCDHEC "has been and continues to be heavily involved in . . . remediation efforts.").

In sum, there is a broad and pervasive regulatory regime in place to protect against potential releases from petroleum product pipelines. However, when such releases occur, federal jurisdiction under the CWA is triggered *only* for releases to waters of the U.S. (and adjoining shorelines) – Congress left jurisdiction for other releases to the states. Moreover, although Congress specifically addressed oil spills in the CWA, Congress never suggested that such events would be subject to permitting under CWA Section 402's National Pollutant Discharge Elimination System ("NPDES") Program. Nor has EPA, the Agency charged with implementing the NPDES Program, ever interpreted the Program as applying to oil spills. This makes sense, since the NPDES Program is not a spill response program: it is an "outfall" permit program under which specific effluent limits and

monitoring requirements are established for direct industrial discharges to waters of the U.S.

SUMMARY OF ARGUMENT

The District Court properly found that Appellants failed to state a claim for relief under the CWA because this case does not involve a point source discharge into a navigable water. Point sources are defined in the CWA as "discernible, confined and discrete conveyance[s]" that discharge channeled or collected fluids to navigable waters. 33 U.S.C. § 1362(14). Nonpoint sources, by contrast, release pollutants in a diffuse way (e.g., groundwater migration) to a regulated water body.

NPDES requirements apply only to discharges of pollutants from point sources. *See id*. §§ 1311(a), 1342(a). The Act defines "discharge of a pollutant" as the "addition of any pollutant to navigable waters *from any point source*." *Id*. § 1362(12) (emphasis added). The statutory provisions make clear that NPDES requirements apply only where a "point source" is the means by which pollutants are added to navigable waters. When pollutants eventually reach navigable waters by means other than a discernible, confined, and discrete conveyance, as is the case here, there is no discharge of a pollutant subject to NPDES requirements. Instead, there is only a nonpoint source discharge. *See* S. Rep. No. 95-370, at 8 (1977) (noting the "clear and precise distinction" between point sources that are subject to NPDES regulation and nonpoint sources that are subject to state and local nonpoint

source management programs). Thus, as the District Court held, "[t]he migration of pollutants through soil and groundwater is nonpoint source pollution that is not within the purview of the CWA." App. 417 (Op. at 8).

The fact that NPDES requirements do not apply to the types of discharges at issue here can be illustrated by examining the permitting program itself. Even assuming one were able to identify the various discharge points from which migrating pollutants reach navigable waters, access to conduct treatment, sampling, or monitoring would likely be impossible. The NPDES program's purpose is to address "end of pipe" discharges into navigable waters—it simply was not designed to regulate the type of seepage and diffuse migration at issue in this case. Under the Appellants' theory, an NPDES permit could be required any time pollutants are accidentally released from a pipeline or other source and migrate through groundwater or soil to navigable waters. NPDES requirements could apply no matter how far those pollutants must migrate, no matter how diffuse that migration is, and no matter how many days, weeks, months, or even years that migration takes. Such a broad theory of CWA liability impermissibly expands the scope of the NPDES program to nonpoint sources, and would make the program unworkable. The District Court properly rejected Appellants' efforts to use the CWA citizen suit provision to effectively rewrite the NPDES program.

ARGUMENT

I. APPELLANTS' THEORY OF LIABILITY IGNORES THE CWA'S FUNDAMENTAL DISTINCTION BETWEEN POINT AND NONPOINT SOURCES

CWA Section 301 states that the "discharge of any pollutant [to a navigable water] by any person shall be unlawful." 33 U.S.C. § 1311(a). Section 402 provides an important exception to this broad prohibition: EPA or a delegated state may "issue a permit for the discharge of any pollutant" from a point source "notwithstanding section 1311(a) of this title." *Id.* §§ 1342(a)(1), 1362(12) (defining "discharge of any pollutant" to mean "any addition of any pollutant to navigable waters from any point source"). A "point source" is "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Sections 301 and 402, read along with the pertinent statutory definitions, establish that NPDES permits are required only for point source discharges. Nonpoint source pollution is not regulated under the CWA, but is instead addressed by state and local environmental programs.

The CWA thus draws a "clear and precise distinction between point sources, which [are] subject to direct Federal regulation, and nonpoint sources, control of which was specifically reserved to State and local governments" *See* S. Rep. No. 95-370, at 8. The statute directs EPA to provide information to the states to aid in the control of nonpoint source pollution. *See* 33 U.S.C. § 1314(f). Congress knew

that both point source discharges and nonpoint source pollution could impact water quality, but it nevertheless decided to require NPDES permits only for point source discharges to navigable waters.

Petroleum product pipelines, like the pipeline at issue in this case, transport valuable products. They are not waste conveyances like outfall pipes or other facilities that may be subject to NPDES permitting. Indeed, Appellants cite no case where a petroleum product transmission pipeline has been held to be a point source under the NPDES program. That is not surprising – the NPDES program is for man-made waste conveyances to waters of the U.S., not accidental and temporary discharges on land that may eventually make their way to waters of the U.S. *See*, *Sierra Club v. Abston Const. Co., Inc.*, 620 F.2d 41, 45 (5th Cir. 1980) (finding a point source because human action had the effect of channeling or changing the path of the contaminated water). As the District Court found, "In the case at bar, there is no allegation that the Defendants have affirmatively undertaken any action to channel or direct contaminants to navigable waters and there is no discrete mechanism conveying the pollutants to navigable waters." App. 419 (Op. at 10).

Appellants allege that a point source need not be the direct source of the pollutant as long as the pollutant is eventually conveyed to navigable waters. *See generally*, Doc. 14 at § IB. However, diffuse migration of a pollutant to a

navigable water—whether through groundwater or seepage through soil—does not constitute an addition of a pollutant to a navigable water from a point source.[13] The mere fact that a pollutant eventually finds its way to a navigable water is insufficient to constitute a covered discharge, because the term "discharge of a pollutant" requires that the "point source" itself be the actual or direct conveyance from which the pollutant is added to navigable waters. Any other reading of the CWA would eliminate all meaningful differentiation between the terms "point source" and "nonpoint source," as nearly all nonpoint source pollution can be traced back to some conveyance. *See 26 Crown Assos. v. Greater New Haven*, No. 3:15-cv-1439 (JAM), 2017 WL 2960506, at *9 (D. Conn., July 11, 2017) ("if the Clean Water Act were to apply as a routine matter to the discharge of pollution onto the ground that ends up seeping into the ground water, then Congress's purpose to limit the scope of the Clean Water Act would be easily thwarted."). The method of discharging to a navigable water is a key distinction under the Act, and the District Court properly found that Appellants' failure to allege a direct discharge to navigable waters was fatal to their claims.

Appellants allege that unpermitted discharges of pollutants via hydrologically connected groundwater to surface waters of the United States

[13] Appellants claim this is not a case of a "diffuse flow of pollutants", but in fact the complaint alleges exactly that: alleging that pollutants flowed through "seeps, flows, fissures, and channels" to waters of the U.S. App. 22 (Compl. at ¶ 65).

violate the CWA. However, the weight of authority holds that discharges to groundwater are *not* regulated under the CWA even if the groundwater is hydrologically connected to waters of the United States. For example, in 2014, in *Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc.*, 25 F. Supp. 3d 798, 810 (E.D.N.C. 2014), the Eastern District of North Carolina confronted the issue of whether seepage from coal ash basins at one of the defendant's power plants, alleged to contain contaminants and to carry those contaminants through groundwater into a lake, was a discharge prohibited by the CWA. The court emphatically held that "Congress did not intend for the CWA to extend federal regulatory authority over groundwater, regardless of whether that groundwater is eventually or somehow 'hydrologically connected' to navigable surface waters." *Id. See also*, *Chevron U.S.A., Inc. v. Apex Oil Co*., 113 F. Supp. 3d 807, 816-17 (D. Md. 2015) ("even if [] [it] is hydrologically connected to a body of 'navigable water,'" groundwater is not regulated under the OPA); *Tri-Realty Co. v. Ursinus Coll.*, No. 11-5885, 2013 WL 6164092, at *9 (E.D. Pa. Nov. 21, 2013) ("Congress did not intend either the CWA or the OPA to extend federal regulatory authority over groundwater, regardless of whether that groundwater is eventually or somehow 'hydrologically connected' to navigable surface waters."); *Greater Yellowstone v. Lewis*, 628 F.3d 1143, 1153 (9th Cir. 2010) (when precipitation "seeps . . . into [mining] pits containing waste rock" and "eventually enter[s] [a]

surface water," it is nonpoint source pollution); *26 Crown Assos. v. Greater New Haven*, No. 3:15-cv-1439 (JAM), 2017 WL 2960506, at *8 (D. Conn., July 11, 2017) (groundwater migration is not "a discrete and channelized conveyance of the kind that is required for . . . NPDES permitting requirements to apply.").

In *Sierra Club v. Abston Const. Co., Inc.*, 620 F.2d 41, 44 (5th Cir. 1980), the Fifth Circuit rejected a "conduit" theory of CWA liability similar to Appellants'. In *Abston*, the plaintiff's theory would merely have required "a showing of the original sources of the pollution to find a statutory point source, regardless of how the pollutant found its way from that original source to the waterway." *Id*. The Fifth Circuit rejected the theory, noting that its acceptance would expand the scope of the NPDES program to encompass "the broad drainage of rainwater carrying oily pollutants from a road paralleling the waterway, or animal pollutants from a grazing field contiguous to the waterway." *Id.* The court held that "[t]he focus of this Act is on the 'discernible, confined and discrete' conveyance of the pollutant, which would exclude natural rainfall drainage over a broad area." *Id*. *See also, Nat'l Wildlife Fed'n v. Consumers Power Co*., 862 F.2d 580, 584 (6th Cir. 1988); *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165, 175 (D.C. Cir. 1982).

These cases expose a fatal flaw in Appellants' theory. NPDES requirements do not apply merely because pollutants ultimately reach navigable waters. For

there to be such a discharge, the source of the pollutants must be the actual and direct means by which the pollutant is added to a navigable water. Otherwise, Congress's "clear and precise" distinction between point sources and nonpoint sources would be rendered meaningless. *See* S. Rep. No. 95-370, at 8.

Appellants' overbroad theory could result in the imposition of NPDES requirements not only on diffuse migration of pollutants through groundwater, but also on "paradigmatic examples of nonpoint source pollution" such as "runoff or windblown pollutants from any identifiable source, whether channeled or not." *Cordiano v. Metacon Gun Club*, 575 F.3d 199, 224 (2d Cir. 2009). However, "point and nonpoint sources are not distinguished by the kind of pollution they create or by the activity causing the pollution, but rather by whether the pollution reaches the water through a confined, discrete conveyance." *Trs. For Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984). An interpretation of the CWA that turns solely on whether the release of pollutants from a point source eventually reaches a navigable water "would eviscerate the point source requirement and undo Congress' choice" to exclude things like diffuse runoff and atmospheric deposition from the NPDES program. *Cordiano*, 575 F.3d at 224.

EPA's guidance on the distinction between point and nonpoint sources provides additional evidence that diffuse migration of pollutants is not subject to the NPDES program. *See, e.g.,* U.S. EPA, "What is Nonpoint Source?",

https://www.epa.gov/nps/what-nonpoint-source ("Nonpoint source pollution generally results from land runoff, precipitation, atmospheric deposition, drainage, seepage or hydrologic modification."); *see also Cordiano*, 575 F.3d at 220-21 (quoting comparable descriptions of nonpoint source pollution from EPA guidance documents). These passages reflect EPA's recognition that a critical distinction between point sources and nonpoint sources is how pollutants reach navigable waters. Appellants' over-expansive interpretation of point source discharges should be rejected by this Court and the District Court's opinion should accordingly be upheld.

II. APPELLANTS' THEORY OF NPDES LIABILITY IS UNWORKABLE

Appellants' theory of liability would also lead to impracticable and unworkable results. *See Ariz. State Bd. for Charter Schools v. U.S. Dep't of Educ.*, 464 F.3d 1003, 1008 (9th Cir. 2006) ("statutory interpretations which would produce absurd results are to be avoided."). Under Appellants' theory, much of what EPA and the courts have long considered to be nonpoint source pollution could suddenly be included in the NPDES program. While this case involves a transmission pipeline, the breadth of Appellants' theory would extend to any source of contamination that could potentially reach navigable water, including spills from other forms of transportation such as rail or trucks, or leaks from storage tanks or septic systems. Indeed, there appears to be no meaningful limit to

the number of sources that could require permits under the Appellants' broad interpretation of the statute. Because all that is required under the Appellants' theory to trigger NPDES liability is the eventual migration of a pollutant—no matter how negligible—to a navigable water, hundreds of thousands of additional NPDES permits could potentially be required nationwide. Congress could not have intended such an absurd result when it drew sharp and meaningful distinctions between point and nonpoint source pollution control throughout the CWA and preserved primary authority over land use and non-point discharges for state and local governments.

The fact that NPDES requirements do not apply to the types of discharges Appellants allege can also be illustrated with reference to the objectives and mechanics of the NPDES permit program. The NPDES program is not a spill response program. It is an "end of pipe" or "outfall" permit program under which specific effluent limits and monitoring requirements are established for direct industrial discharges to waters of the U.S. When an industrial facility is planning operations that will involve a discharge to waters of the U.S., the facility must apply for an NPDES permit before such operations begin. The EPA or state permit writer then sets effluent limits based on the specific discharge and the water quality of the specific receiving water. Thus, NPDES permit applications require a precise outfall description and location. 40 C.F.R. § 122.21(j)(3)(i)(A-F). If granted, the

permit will contain numeric effluent limitations and monitoring requirements and other conditions specific to the water quality of the receiving water body. *See id.* § 122.21(j)(4)(i).

The potential underground or above ground migration of pollutants from an accidental pipeline release cannot fit within the NPDES permitting requirements because it is diffuse and unfixed, not a defined outfall. In their complaint, Appellants allege that "the pipeline, the spill site, and the seeps, flows, fissures, and channels through which pollutants and contaminants flow" are *all* point sources that require NPDES permits. App. 22 (Compl. at ¶ 65).[14] Appellants appear to envision a series of NPDES permits covering the spill site and every potential conduit of contaminants therefrom. Thus, under Appellants' theory, any individual spill event could lead to numerous NPDES permits depending on the spill profile and the number of "seeps, flows, fissures, and channels" involved. This in and of itself demonstrates the unworkable nature of Appellants' theory, and the fact that this case does not involve a discrete, discernable point source.

NPDES permitting is unworkable in the setting Appellants posit because the discharge cannot be properly predicted, identified, monitored, or regulated. For pollutants that migrate diffusely from a particular area via groundwater or soil, it

[14] Perhaps recognizing the overreach of their Complaint, Appellants' opening brief focuses only on the pipeline as an alleged point source. *See* Doc. 14 at n. 6.

may not be possible to pinpoint the ultimate connection to a navigable water. Thus, there are no readily identifiable, defined outfalls or discharge points that can be used for purposes of calculating effluent limitations and conducting the required sampling and monitoring under the NPDES program. *See* 40 C.F.R. Part 122 Subpart C. Even if the actual location where seepage from the spill site connected with navigable waters could be identified, such migration is ephemeral, and could change depending on hydrologic and geologic conditions. Thus, assuming a specific underground "flow" could be identified, permitting such a feature would be unworkable.

NPDES permits are issued to the owner or operator of a facility for discharges from that facility to a navigable water. Thus, NPDES permits are premised on the assumption that the permit holder controls the discharge and has access to the discharge site for monitoring. This assumption does not hold for spill sites, or "seeps, flows, fissures, and channels" downgradient from such sites. App. 22 (Compl. at ¶ 65). Even assuming a discharge point to a navigable water could be identified, it may not be possible for the owner or operator of the facility from which the spill occurred to conduct the required sampling and monitoring because the location may be miles away and beyond the owner or operator's control. While Appellants allege the Defendants-Appellees are liable for failing to obtain NPDES

permits for the spill, the reality is they could not have obtained such permits if they tried.

In short, it would be impracticable, if not impossible, to apply NPDES requirements to the types of diffuse discharges at issue in this case. Moreover, the practical consequences of Appellants' overbroad theory of NPDES liability would be staggering. Whether those types of groundwater discharges require an NPDES permit "add[s] a new level of uncertainty and expense to NPDES permitting and would expose potentially hundreds of . . . permittees to . . . litigation and legal liability if they or [the agency] has happened to make the 'wrong' choice . . . ." *Umatilla Waterquality Prot. Ass'n v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 1320 (D. Ore. 1997). This Court should reject Appellants' attempt to use the CWA citizen suit provision to effectively rewrite, and vastly expand, the NPDES program.

CONCLUSION

Appellants' theory of liability finds no support in the statute or case law, and its application would make the NPDES permitting program unworkable. For all these reasons and those stated in Appellees' Brief, Appellants have failed to adequately allege an actionable discharge under the CWA, and the District Court's decision should be upheld.

RESPECTFULLY SUBMITTED this 8th day of September, 2017.

/s/ Cynthia L. Taub
David H. Coburn
Cynthia L. Taub
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., NW
Washington, D.C. 20036
Telephone: (202) 429-8063
Facsimile: (202) 429-3902
dcoburn@steptoe.com
ctaub@steptoe.com

Counsel for Amici Curiae American Petroleum Institute, Association of Oil Pipe Lines, GPA Midstream Association, and Texas Pipeline Association

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B) and 32(g)(1), 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 5,594 words.

/s/ Cynthia L. Taub
Cynthia L. Taub
STEPTOE & JOHNSON LLP

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September, 2017, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/s/ Cynthia L. Taub
Cynthia L. Taub
STEPTOE & JOHNSON LLP