IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON DIVISION

UPSTATE FOREVER AND SAVANNAH RIVERKEEPER, Plaintiffs, v. KINDER MORGAN ENERGY PARTNERS, L.P., AND PLANTATION PIPE LINE COMPANY, INC. Defendants.	CIVIL ACTION No. 8-16-cv-4003-HMH **PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

In 2014, Kinder Morgan's Plantation Pipeline spilled hundreds of thousands of gallons of gasoline next to waterways in Anderson County – one of the largest petroleum spills in South Carolina history. Defendants never detected this ongoing major spill; it was noticed by local residents who saw and smelled gasoline. The plaintiffs, conservation groups with members in Anderson County (the "Conservation Groups"), discovered last summer that, two years after the spill, Defendants' gasoline and gasoline contaminants continue to flow into and pollute Anderson County's waters in substantial amounts and that Defendants were proposing a Corrective Action Plan that would not be adequate to stop the continuing flow of gasoline and gasoline toxins into the waterways and that would allow pollution of the waterways to continue indefinitely.

After giving Defendants and the South Carolina Department of Health And Environmental Control ("DHEC") notice of the continued water pollution and of the Conservation Groups' intent to seek relief under the federal Clean Water Act, the Conservation Groups brought this enforcement action. It seeks to stop Defendants' ongoing and continuing

pollution of these parts of the Savannah River System in Anderson County and to have Defendants respond with an adequate Clean Water Act penalty. DHEC did not object to and took no action to stop or interfere with the Conservation Groups' enforcement of the federal Clean Water Act.

Large amounts of gasoline and gasoline toxins are at the Spill Site, and they continue to discharge pollutants into the surface waters of the Savannah River Basin in violation of the Clean Water Act. Unless they are stopped, these discharges of gasoline pollutants will continue to contaminate the waterways, which people use for fishing and farming, and which forms downstream lakes where people live, boat, fish, and swim.

FACTUAL BACKGROUND

Defendants' Petroleum Spill Site. Defendants own the Plantation Pipeline, which has the capacity to carry over 20 million gallons of petroleum through Anderson County, South Carolina each day. Compl. ¶¶ 3, 4, ECF No. 1. In late 2014, local citizens discovered dead plants, a petroleum odor, and pools of gasoline near the pipeline and Lewis Drive in Belton, SC (the "Spill Site" or "Spill Area"). *Id.* ¶ 5. Defendants later confirmed that at least 369,000 gallons of gasoline (the Conservation Groups believe that the spill was substantially larger and occurred over an extended period of time) were spilled when an aged dent in the pipeline failed, making this petroleum spill one of the largest in South Carolina history. *Id.* ¶¶ 6. By Defendants' own admission, only 213,951 gallons of petroleum have been recovered since the spill was discovered. At least 155,000 gallons remain at the site and in the waterway.

The Spill Site contains numerous hazardous petroleum compounds, including benzene, toluene, ethylbenzene, xylenes, methyl tert-butyl ether, and naphthalene, which are harmful to human health and the environment. *Id.* ¶¶ 10, 14–15.

There are two streams and two wetlands near the Spill Site. Browns Creek flows within 1,000 feet of the release point to the northwest, and is surrounded by wetlands. Cupboard Creek and a second wetland lie 400 feet south of the release point. *Id.* ¶ 11. Both streams are part of the Savannah River System, and flow downstream into Broadway Lake, Lake Secession, Lake Russell, and the Savannah River.

Illegal Discharges. For at least two years, Defendants have been polluting United States and South Carolina waters through unpermitted, illegal discharges into wetlands, surface waters and groundwater. *Id.* ¶¶ 15–17, 21–25, 27. These discharges contain large quantities of benzene, toluene, ethylbenzene, xylenes, and naphthalene, *id.* ¶ 21, 24, and pollutant levels have gotten worse over time, *id.* ¶ 24.

Discharges into United States waters are occurring through seeps, flows, fissures, and channels, as well as through hydrologically connected groundwater. *Id.* ¶¶ 54–56, 62, 65. Among these conveyances are two large unpermitted streams of contaminated water, sometimes called "seeps," which are discharging from the Spill Site into Browns Creek. Defendants' filings with DHEC describe a 30 foot by 12 foot seep and a 12 foot by 12 foot seep that are "[i]mpact[ing] . . . surface water quality." Defendants' Surface Water Protection Plan Addendum (January 20, 2017) (Exhibit A).[1] The enforcement action sets out that all these seeps, flows, fissures, channels, and hydrologically connected groundwater carry the gasoline and gasoline pollutants into Browns Creek, Cupboard Creek, and surrounding wetlands. *Id.* ¶ 11 & 15.

[1] In connection with a motion to dismiss, the Court may consider public records such as this one. *Philips v. Pitt Cty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009).

The Conservation Groups' Complaint. To address these violations, the Conservation Groups brought this Clean Water Act enforcement action on December 28, 2017. *See* ECF No. 1. The Complaint sets out that Defendants are discharging from unauthorized point sources to waters of the United States, and are releasing unauthorized and prohibited discharges through close hydrologic flow of groundwater into surface waters. *Id.* ¶ 56. All these unauthorized discharges are ongoing violations of the Clean Water Act. *Id*.

DHEC's Actions. Both before and after the Conservation Groups sent their notice of the violations, neither the U.S. Environmental Protection Agency ("EPA") nor DHEC commenced a civil or criminal action that covers the claims asserted in the Conservation Groups' Complaint, or objected to the Conservation Groups' action. Defendants have submitted their assessments of the Spill Site to DHEC, have removed some gasoline from the site, and submitted their version of a Corrective Action Plan to address the hundreds of thousands of gallons of gasoline present in and continuing to discharge from the site.

Many members of the public, including the Conservation Groups, submitted comments that were critical of Defendants' proposed Corrective Action Plan. *Id.* ¶ 36. Among other things, Defendants' proposed Plan would allow Defendants to continue to pollute surrounding waterways; Defendants' Plan does not require Defendants to continue to remove gasoline from the Spill Site; Defendants' Plan does not require adequate monitoring; and Defendants' Plan does not require "biosparging" treatment to an adequate extent in the area where the contamination at the Spill Site originates. *Id.* ¶ 37.

Anderson County Council unanimously passed a resolution pointing out these defects in Defendants' proposed Plan and asking DHEC to require a Plan that would adequately address the ongoing pollution from the spill. Exhibit B.

DHEC reviewed Defendants' proposed Corrective Action Plan and requested an Addendum from Defendants to "respond" to numerous public comments, including comments from the Conservation Groups. Defs' Mot. to Dismiss, Ex. F, at 4, ECF No. 14-9. However, DHEC has not indicated whether it will require Defendants to stop discharging gasoline pollution into the waterways.

DHEC's authority to oversee environmental cleanups pursuant to state Underground Storage Tank regulations in no way restricts the rights of citizens to enforce the federal Clean Water Act or this Court's ability to ensure that Defendants comply with the federal Clean Water Act. The Clean Water Act expressly contemplates that citizens and federal courts will enforce the Clean Water Act in the absence of pre-existing state criminal or civil judicial enforcement proceedings – which have not been brought by DHEC in this instance.

LEGAL BACKGROUND

The Clean Water Act seeks to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To accomplish that objective, Congress set the national goal that "the discharge of pollutants into the navigable waters be eliminated." *Id.* § 1251(a)(1). Accordingly, the Clean Water Act prohibits the discharge of pollutants from a point source to waters of the United States except in compliance with, among other conditions, a National Pollutant Discharge Elimination System ("NPDES") permit issued pursuant to 33 U.S.C. § 1342. *Id.* § 1311(a). Each discharge of a pollutant that is not authorized by a permit is a violation of the Clean Water Act. 33 U.S.C. §§ 1311(a); 1342(a); 1365(a), (f). Of course, Defendants have no such permit for their spill and ongoing discharges of gasoline into United States waters in Anderson County.

District courts may grant a motion to dismiss for lack of subject matter jurisdiction "only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Richmond, Fredericksburg & Potomac R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991). And courts may grant a Rule 12(b)(6) motion to dismiss only if a complaint does not "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible when the complaint alleges facts that allow the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

ARGUMENT

I. This Court Has Jurisdiction Over Conservation Groups' Claims, and the Groups Have Alleged Sufficient Facts to Support Their Claims.

A. Defendants' Clean Water Act Violations Are Ongoing and Reasonably Likely to Occur Again.

Defendants wrongly and repeatedly assert that they are not continuing to discharge and pollute Anderson County waterways with gasoline pollution because they contend the leaking Plantation Pipeline was plugged in 2014. However, the critical fact is that even if Defendants have plugged their pipeline, they have not stopped their discharges into United States waters. Defendants' gasoline pollution continues to flow into waters of the United States, and Defendants contemplate that their gasoline pollution will continue to flow into the waterways for years to come.

Defendants' argument misconstrues the Supreme Court's decision in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc*, 484 U.S. 49 (1987), and ignores the fact that, as set out in the Conservation Groups' enforcement action, the point sources in this case

include not only the pipeline, but also the Spill Site, and the seeps, flows, fissures, and channels through which pollutants and contaminants flow.

In *Gwaltney*, the Supreme Court ruled that "wholly past" violations of effluent standards are not cognizable under the Clean Water Act's citizen suit provision. 484 U.S. 49, 57 (1987); *see, e.g.*, *Brewer v. Ravan*, 680 F. Supp. 1176, 1183 (M.D. Tenn. 1988) (allegation that defendant violated PCB effluent limitation five years before complaint was filed was not enough to sustain a Clean Water Act claim where plaintiff did not allege that violations were reasonably likely to continue in the future). *Gwaltney* did ***not*** involve the ongoing flow of pollutants from a point source to a navigable waterway; instead, it addressed a ***wholly past*** violation that was no longer continuing.

Several courts, including district courts in the Fourth Circuit, have issued decisions after *Gwaltney*, which have followed the Supreme Court's decision and held that Clean Water Act discharge violations ***are "ongoing"*** when a pollutant previously added to a site or to groundwater continues to reach a navigable waterway. *Ohio Valley Envtl. Coal. Inc. v. Pocahontas Land Corp.*, No. CIV.A. 3:14-11333, 2015 WL 2144905, at *10 (S.D.W. Va. May 7, 2015) (Clean Water Act liability can exist for pollutant discharges from previously constructed valley fill toes into downstream waters); *Ohio Valley Envtl. Coal., Inc. v. Hernshaw Partners, LLC*, 984 F. Supp. 2d 589, 598 (S.D.W. Va. 2013) ("one may continue to be in violation of the Clean Water Act [due to discharges from previously constructed valley fill] even if the activities that caused the violations have ceased"); *N.C. Wildlife Fed'n v. Woodbury*, No. 87-584-Civ-5, 1989 WL 106517, at *2–*3 (E.D.N.C. Apr. 25, 1989) (holding discharges from a tract with unremediated dredged and fill material to wetlands were "continuing"); *see also Umatilla Waterquality Protective Ass'n, Inc. v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 1322 (D. Or.

1997) (pollutant discharges from old unlined brine pond to navigable water through connected groundwater are "ongoing"); *Werlein v. United States*, 746 F. Supp. 887, 896 (D. Minn. 1990), *vacated in part on other grounds*, 793 F. Supp. 898 (D. Minn. 1992) (chemical discharges into lakes due to rainwater infiltration through soil where ammunition was dumped years earlier are "ongoing").

And courts have recognized that a defendant violates the Clean Water Act when pollutants move from a contamination source to a waterway, even though the pollutants are flowing from a location where the defendant discharged them years before. *Sierra Club v. Virginia Elec. & Power Co.*, 145 F. Supp. 3d 601, 607-08 (E.D. Va. 2015) (discharges of coal ash pollutants from old lagoon through groundwater); *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428, 445 (M.D.N.C. 2015) (discharges of coal ash pollutants from old lagoon through surface impoundment seeps and groundwater)

As the court in *Werlein v. United States* recognized, the Clean Water Act requires that polluters be held responsible for ongoing migration and discharge of pollutants:

> Clearly, the purpose of the [] Act is to prevent the pollution of water. Where a polluter dumps toxic substances directly into a waterway, the damage is done, and that violation is 'wholly past' under *Gwaltney* if plaintiffs later file suit. Here, though, there is toxic waste that has not yet reached a waterway, but is being introduced into the waterway over time. This is an 'ongoing' pollution of a waterway. ***There are toxic substances at the Trio Solvents site that may yet be prevented from entering the water.*** This is consistent with the goal of the CWA, and with the reasoning of *Gwaltney*.

746 F. Supp. at 897 (emphasis added). Congress did not intend to exempt polluters responsible for large toxic releases from Clean Water Act liability merely because they stopped the initial pollution-creating act but continue to discharge pollutants into United States waters – especially when, as with Defendants' spill – the polluter can prevent ongoing discharges that otherwise could continue for decades into the future.

The Fourth Circuit and District Courts in the Fourth Circuit have enforced the federal anti-pollution laws to protect the nation's waters from ongoing contamination, even if the initial polluting activity has stopped. The Fourth Circuit recently held that the "to be in violation of" language in federal anti-pollution laws includes pollution like Defendants' gasoline pollution. The statutory phrase "to be in violation of":

> [D]oes not necessarily require that a defendant be currently engaged in the activity causing the continuous or ongoing violation. Rather, the proper inquiry centers on 'whether the defendant's actions – past or present – cause an ongoing violation' . . . . In other words, although a defendant's ***conduct*** that is causing a ***violation*** may have ceased in the past . . . what is relevant is that the ***violation*** is continuous or ongoing.

Goldfarb v. Mayor of Baltimore, 791 F.3d 500, 513 (4th Cir. 2015) (interpreting language in the Resource Conservation and Recovery Act ("RCRA")) (emphases in original) (internal quotations and citations omitted). The "to be in violation" language in the RCRA statute is identical to the Clean Water Act language interpreted in *Gwaltney*. In *Pocahontas Land Corp.*, *Hernshaw Partners*, and *North Carolina Wildlife Federation*, United States District Courts in the Fourth Circuit have applied the identical Clean Water Act language to include pollution like the Defendants'.

Defendants are wrong when they argue that the *Pocahontas Land Corp* and *Hernshaw Partners* decision (Southern District of West Virginia) and the *North Carolina Wildlife Federation* decision (Middle District of North Carolina) can be distinguished because defendants in those cases intentionally retained reservoirs of pollutants over an extended period of time without taking sufficient remedial measures.

First, as noted in Section IB. below, it makes no difference whether the point source discharging to a waterway is the original source of pollution, and the intent of the discharging entity is irrelevant. For example, in the long line of cases set out above, coal ash lagoons, brine

ponds, and contamination sites were not the original source of the pollution, but were point sources from which the pollution flowed through seeps or groundwater into surface waters. Second, in these cases, it did not matter whether the defendants intentionally created a reservoir of pollution or how long they polluted. For example, it did not matter whether the Chafin Branch Coal Company in *Hernshaw Partners* filled areas with mine waste over the course of a day or over the course of a lifetime. What mattered was that the valley fills were point sources that continually discharged selenium into Tug Fork. *See also Am. Canoe Ass'n v. Murphy Farms*, 412 F.3d 536, 539 (4th Cir. 2005) (finding ongoing violation for discharging without a NPDES permit because although defendant took remedial steps, they were insufficient to eliminate the "continuing likelihood of recurrence").

Defendants rest their case substantially on a single pre-*Gwaltney* decision in another circuit. In *Hamker v. Diamond Shamrock Chemical Co.*, the Fifth Circuit dismissed plaintiff's Clean Water Act section 1365 claim because "even liberally construed, the complaint allege[d] only a single past discharge with continuing effects, not a continuing discharge." 756 F.2d 392, 397 (5th Cir. 1985). There, the plaintiffs alleged only negligent operation of a pipeline, lingering contamination of groundwater, and damage to grasslands. *Id.* The Conservation Groups' enforcement action is entirely different; this enforcement action expressly alleges and is based on continuing discharges of gasoline pollutants into waters of the United States and expressly alleges that Defendants continue to be in violation of the Clear Water Act.

Further, *Hamker* was decided prior to the Supreme Court's decision in *Gwaltney*. And, if it were interpreted to have the meaning that Defendants ascribe to it, it would be contrary to the decisions of the Fourth Circuit and District Courts in the Fourth Circuit set out above.

Defendants' argument has also been rejected by courts outside the Fourth Circuit, such as the *Umatilla* and *Werlein* decisions cited above, *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300 (S.D. Iowa 1997), and *Marrero Hernandez v. Esso Standard Oil Co. (Puerto Rico)*, 597 F. Supp. 2d 272 (D.P.R. 2009).

In *Williams Pipe Line*, the district court held that the Clean Water Act covered spills and leaks from a pipeline and above-ground tanks into groundwater that moved toward a wetland and a river. 964 F. Supp. at 1320. The court held that the contaminated Williams Pipe Line facility qualified as a point source and that pollution discharges into a swamp continued to occur through spills, leaks, and other releases. *Id.*

In *Marrero Hernandez*, the court concluded that an oil company's failure to take remedial measures for leaks should be treated as a continuing violation, since "it is not the physical act of discharging toxic materials that gives rise to citizen standing under the CWA, but the consequences of the discharge in terms of lasting environmental damage and adverse health effects on the population." 597 F. Supp. 2d at 286. The leaks emanated from underground storage tanks that were removed from the site in the early 1990s. *Id.* at 276.

In this case, the Conservation Groups have clearly alleged that there are ongoing Clean Water Act violations due to continuing discharges from identified point sources. Contamination has been detected in Browns Creek every month since August 2016, and pollutant levels have increased over time. Compl. ¶¶ 15–17, 21–25, 27. Those allegations set out Clean Water Act violations.

B. The Pipeline, Spill Area, and the Seeps, Flows, Fissures, and Channels Are Point Sources Covered Under the Clean Water Act.

The pipeline, Spill Area, and the seeps, flows, fissures, and channels on the Lewis property are point sources that discharge into navigable waters. The Clean Water Act defines a

"point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, [or] container . . . from which pollutants are or may be discharged," 33 U.S.C. § 1362(14), and prohibits "any addition of any pollutant to navigable waters from any point source" without a NPDES permit, *id.* §§ 1311(a); 1362(12).

Courts have interpreted the term "point source" broadly. *See Dague v. City of Burlington*, 935 F.2d 1343, 1354 (2d Cir. 1991) ("The definition of a point source is to be broadly interpreted . . . ."), *rev'd in part on other grounds*, 505 U.S. 557 (1992); *United States v. Earth Scis., Inc.*, 599 F.2d 368, 373 (10th Cir. 1979) ("The concept of a point source was designed to further [the Clean Water Act] scheme by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States."); *Ohio Valley Envtl. Coal., Inc. v. Hernshaw Partners, LLC*, 984 F. Supp. 2d 589, 598 (S.D.W. Va. 2013) ("[T]he definition of a 'point source' is intended to be interpreted broadly, as indicated by the statute's 'including but not limited to' language.").

The pipeline is a point source because pollution released from it continues to make its way to waters of the United States. The Fourth Circuit has held that areas like the one that encompasses the pipeline and Spill Site in Anderson County are point sources when they contribute pollutants to navigable waters. *Consolidation Coal Co. v. Costle*, 604 F.2d 239, 249–50 (4th Cir. 1979) (holding that "discharges from coal preparation plants and associated areas," which included slurry ponds, drainage ponds, and coal refuse piles, were within Clean Water Act definition of point source), *rev'd on other grounds*, 449 U.S. 64 (1980).

Courts around the country have reached the same conclusion. *See, e.g., N. Cal. River Watch v. City of Healdsburg*, No. C01-04686WHA, 2004 WL 201502 at *11 (N.D. Cal. Jan. 23,

2004), *aff'd*, 496 F.3d 993 (9th Cir. 2007) ("The term 'point source' has been taken beyond pipes and ditches and now includes less discrete conveyances, such as cesspools and ponds"); *Umatilla Waterquality Protective Ass'n, Inc. v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 1321-22 (D. Or. 1997); *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1319–20 (S.D. Iowa 1997) (entire contaminated facility qualified as point source); *Werlein v. United States*, 746 F. Supp. 887, 897 (D. Minn. 1990) ("Several courts have viewed runoff or leaching from disposal pits as a discharge from a point source . . . . At a minimum, there is a factual issue here as to whether the alleged discharges from Trio Solvents [site where ammunition was dumped into soil years earlier] are from a "point source" within the meaning of the CWA.").

Like the unlined waste areas in these cases, the site in Anderson County is heavily channelized and managed by Defendants. Defendants have constructed 2 recovery trenches, 20 recovery sumps, and 15 recovery wells at the site. Defs' Mot. to Dismiss at 27, ECF No. 14-1. In addition, Defendants have identified the boundaries of the oil plume, Defs' Mot. to Dismiss, Ex. B-3, at 5, ECF No. 14-5, and industrial-scale equipment litters the site to control soil placement and manage the direction of oil and water flows. And, as set out above, Defendants have identified two large seeps of gasoline pollution flowing into Browns Creek. Clearly, the Spill Area qualifies as a discernible, confined and discrete source of pollution.

In addition, the seeps, flows, fissures, and channels at the site qualify as point sources. As the court explained in *Sierra Club v. Abston Construction Co.*, 620 F.2d 41, 45 (5th Cir. 1980):

> Nothing in the Act relieves [defendants] from liability simply because the operators did not actually construct those conveyances, so long as they are reasonably likely to be the means by which pollutants are ultimately deposited into a navigable body of water. Conveyances of pollution formed either as a result of natural erosion or by material

> means . . . may fit the statutory definition and thereby subject the operators to liability under the Act.

Id. at 45; *see also Beartooth All. v. Crown Butte Mines*, 904 F. Supp. 1168, 1173-74 (D. Mont. 1995) (finding that certain pits and adits, or passages to pits, at a mine site qualified as "point sources," in part relying on EPA interpretation of the definition of "point source:" "In a letter from the Director of the Water Management Division, the EPA makes clear that 'any seeps coming from identifiable sources of pollution (i.e., mine workings, land application sites, ponds, pits, etc.,) would need to be regulated by discharge permits.'").

Courts across the country – including the United States Supreme Court and the Fourth Circuit – have held that it makes no difference whether the point source discharging to a waterway is the original source of pollution and that the intent of the discharging entity is irrelevant. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004); *W. Va. Highlands Conservancy, Inc. v. Huffman*, 625 F.3d 159, 168 (4th Cir. 2010) (permits are required for discharges from point sources that "merely convey pollutants to navigable waters") (internal quotations omitted); *see United States v. Earth Scis., Inc.*, 599 F.2d 368, 374 (10th Cir. 1979) (holding unintentional discharges of pollutants from a mine system designed to catch runoff from gold leaching site during periods of excess melting met the statutory definition of a point source); *O'Leary v. Moyer's Landfill, Inc.*, 523 F. Supp. 642, 655 (E.D. Pa. 1981) (intent of the discharging entity is irrelevant). The key in all of these cases is that there were "discernable, confined, and discrete conveyances." The Conservation Groups' enforcement action alleges exactly that.

Defendants cite to a series of storm water cases to make the general argument that "soil runoff" from the Spill Site does not qualify as a point source. But Defendants' Clean Water Act violations present a massive spill for which Defendants are solely responsible, not mere storm

water runoff. Defendants' spill, which continues to discharge into and pollute a waterway, is far different from storm water runoff discharges that wash out pollution from roadways soiled by millions of car trips or from diffuse land use activities like agriculture or logging.

In addition, Defendants fail to acknowledge that the storm water cases specifically hold that an identifiable channel of pollution runoff ***does*** qualify as a point source. *Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1070-71 (9th Cir. 2011) ("when stormwater runoff is collected in a system of ditches, culverts, and channels and is then discharged into a stream or river, there is a "discernable, confined and discrete conveyance" of pollutants, and there is therefore a discharge from a point source"), *rev'd on other grounds*, 133 S.Ct 1326 (2013); *PennEnvironment v. PPG Indus., Inc.*, 964 F. Supp. 2d 429, 458–60 (W.D. Pa. 2013) (rejecting defendant's argument that plaintiffs alleged only one point source – "Outfall 001" – and that the rest of the pollution at the site was from nonpoint sources; plaintiffs also alleged that the defendant discharged pollutants from a "'Drainage Ditch,' from seeps and from culverts" and that "even where the seeps do not discharge directly into navigable waters, they feed contaminated waters that flow into point sources, such as the Drainage Ditch, culverts and Outfall 001").[2]

[2] Defendants also claim that *Friends of Santa Fe County v. LAC Minerals*, 892 F. Supp. 1333, 1359 (D.N.M. 1995) indicates that seeps cannot be a point source. However, the reason why the court in that case held that the seeps did not impose Clean Water Act liability was that it erroneously read a human activity requirement into the definition of point source. The court analogized the seeps in that case to nonpoint stormwater runoff from a road because the Defendants did not create the seeps and the seeps were therefore not "human-originated or -derived point sources of pollutants." *Id.* Rather, they were "carriers of water from the alluvium to the surface." *Id.* This human activity requirement does not appear in the statute or in other decisions. In addition, there is human activity in this case, including the improper pipeline patch, the spill of gasoline propelled by Defendants through the pipeline they installed, and the remedial activities that encouraged the gasoline product to move in various directions at the site. District Courts in the Fourth Circuit have recognized unpermitted seeps as violations of the Clean Water Act. *See, e.g., Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428 (M.D.N.C. 2015).

Contrary to Defendants' statements that the Conservation Groups have not alleged "facts" to support direct discharge to wetlands and streams, Defs' Mot. to Dismiss at 15-16, the Conservation Groups have repeatedly alleged that there are "discernable, confined, and discrete" seeps, flows, fissures, and channels at the site which are directly discharging Defendants' pollutants into navigable waters. Compl. ¶¶ 54–56, 62, 65. These fit squarely within the definition of a point source. These are plausible – and in fact well-established – factual allegations, making them sufficient to defeat a motion to dismiss.

C. Point Source Pollutant Discharges Moving Through Groundwater to Navigable Waters are Subject to the Clean Water Act.

Although the Clean Water Act does not cover groundwater pollution *per se*, the EPA and a very long list of courts have made plain that it does cover the pollution of waters of the United States via hydrologically connected groundwater. "[M]ost courts to have considered the issue have held that hydrologically connected groundwaters are regulated waters of the United States" and that unpermitted discharges into such groundwaters are prohibited under Section 301 of the Clean Water Act. *Friends of Santa Fe Cty. v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1358 (D.N.M. 1995). In this footnote, the Conservation Groups set out citations to some of the very long list of courts that have so held. [3]

[3] *See N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 1000 (9th Cir. 2007) (Clean Water Act coverage based on hydrologic connection); *Waterkeeper All. Inc. v. EPA*, 399 F.3d 486, 515 (2d Cir. 2005) (upholding EPA's case-by-case approach to regulating feedlot pollutant discharges to surface waters through connected groundwater); *Quivara Mining Co. v. EPA*, 765 F.2d 126, 130 (10th Cir. 1985) (Clean Water Act coverage where discharges ultimately affected navigable-in-fact streams via underground flows); *U.S. Steel Corp. v. Train*, 556 F.2d 822, 852 (7th Cir. 1977) (Clean Water Act "authorizes EPA to regulate the disposal of pollutants into deep wells, at least when the regulation is undertaken in conjunction with limitations on the permittee's discharges into surface waters"), *overruled on other grounds by City of W. Chicago*

v. U.S. Nuclear Regulatory Comm'n, 701 F.2d 632, 644 (7th Cir. 1983); *S.F. Herring Ass'n v. Pac. Gas & Elec. Co.*, 81 F. Supp. 3d 847, 863 (N.D. Cal. 2015); *Haw. Wildlife Fund v. Cty. of Maui*, No. CIV. 12-00198 SOM/BM, 2015 WL 328227, at *5 (D. Haw. Jan. 23, 2015) ("exempting discharges of pollutants from a point source merely because the polluter is lucky (or clever) enough to have a nonpoint source at the tail end of a pathway to navigable waters would undermine the very purpose of the Clean Water Act"); *Raritan Baykeeper, Inc. v. NL Indus., Inc.*, No. 09-CV-4117 JAP, 2013 WL 103880, at *15 (D.N.J. Jan. 8, 2013) (Clean Water Act covers hydrologically connected groundwater; *Ass'n Concerned Over Res. & Nature, Inc. v. Tenn. Aluminum Processors, Inc.*, No. 1:10–00084, 2011 WL 1357690, at *17-*18 (M.D. Tenn. 2011) ("groundwater is subject to the CWA provided an impact [sic] on federal waters"); *Greater Yellowstone Coal. v. Larson*, 641 F. Supp. 2d 1120, 1138 (D. Idaho 2009) ("there is little dispute that if the ground water is hydrologically connected to surface water, it can be subject to" the Clean Water Act); *Nw. Envtl. Def. Ctr. v. Grabhorn, Inc.*, No. CV-08-548-ST, 2009 WL 3672895, at *11 (D. Or. Oct. 30, 2009) ("In light of the EPA's regulatory pronouncements, this court concludes that . . . the CWA covers discharges to navigable surface waters via hydrologically connected groundwater."); *Hernandez v. Esso Std. Oil Co.*, 599 F. Supp. 2d 175, 181 (D.P.R. 2009) ("CWA extends federal jurisdiction over groundwater that is hydrologically connected to surface waters that are themselves waters of the United States."); *Coldani v. Hamm*, No. 2:07-CV-0660, 2008 WL 4104292, at *7-*8 (E.D. Cal. Aug. 16, 2007) (pollution of groundwater that is hydrologically connected to navigable surface waters falls within the purview of the Clean Water Act); *N. Cal. River Watch v. Mercer Fraser Co.*, No. C-04-4620, 2005 WL 2122052, at *3 (N.D. Cal. Sept. 1, 2005), *aff'd*, 496 F.3d 993 ("the regulations of the CWA do encompass the discharge of pollutants from wastewater basins to navigable waters via connecting groundwaters"); *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1180 (D. Idaho 2001) ("CWA extends federal jurisdiction over groundwater that is hydrologically connected to surface waters that are themselves waters of the United States"); *Mut. Life Ins. Co. of N.Y. v. Mobil Corp.*, No. CIVA96CV1781RSP/DNH, 1998 WL 160820, at *2-*3 (N.D.N.Y. Mar. 31, 1998) (denying motion to dismiss Clean Water Act claim – plaintiff's complaint alleged that groundwater contaminated by underground storage tank failures three years prior was hydrologically connected to navigable waters); *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1319–20 (S.D. Iowa 1997) (where groundwater flows toward surface waters, there is "more than the mere possibility that pollutants discharged into groundwater will enter 'waters of the United States,'" and discharge of petroleum into this hydrologically-connected groundwater violates the Clean Water Act); *Wash. Wilderness Coal. v. Hecla Mining Co.*, 870 F. Supp. 983, 990 (E.D. Wash. 1994) ("since the goal of the CWA is to protect the quality of surface waters, any pollutant which enters such waters, whether directly or through groundwater, is subject to regulation"); *Sierra Club v. Colo. Ref. Co.*, 838 F. Supp. 1428, 1434 (D. Colo. 1993) ("discharge of any pollutant into 'navigable waters' includes such discharge which reaches 'navigable waters' through groundwater"); *McClellan Ecological Seepage Situation v. Weinberger*, 707 F.

Congress has explicitly stated that the objective of the Clean Water Act "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *N. Cal. River Watch v. Mercer Fraser Co.*, No. C-04-4620 SC, 2005 WL 2122052, at *2 (N.D. Cal. Sept. 1, 2005).

> [I]t would hardly make sense for the CWA to encompass a polluter who discharges pollutants via a pipe running from the factory directly to the riverbank, but not a polluter who dumps the same pollutants into a man-made settling basin some distance short of the river and then allows the pollutants to seep into the river via the groundwater.

Id.

The Fourth Circuit has stated in broad terms: "[t]he power over navigable waters also carries with it the 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). Three recent decisions of United States District Courts in the Fourth Circuit have expressly held that the Clean Water Act covers the pollution of waters via hydrologically connected groundwater. *Sierra Club v. Va. Elec. & Power Co.*, 145 F. Supp. 3d 601, 607-08 (E.D. Va. 2015); *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428, 445 (M.D.N.C. 2015); *Ohio Valley Envtl. Coal. Inc. v. Pocahontas Land Corp.*, No. CIV.A. 3:14-11333, 2015 WL 2144905, at *8 (S.D.W. Va. May 7, 2015). These decisions cogently distinguish cases where courts came to a different conclusion, follow the Congressional intent of the Act,

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Supp. 1182, 1195–96 (E.D. Cal. 1988) (Clean Water Act covers groundwater "naturally connected to surface waters that constitute 'navigable waters'"), *vacated on other grounds*, 47 F.3d 325 (9th Cir. 1995); *New York v. United States*, 620 F. Supp. 374, 381 (E.D.N.Y. 1985) (groundwater discharges threatening navigable waters subject to Clean Water Act).

and respect EPA's regulatory determinations. *See, e.g.*, *Yadkin*, 141 F. Supp. 3d at 444-46.[4]

EPA has also explained repeatedly that the Clean Water Act applies to hydrologically connected groundwater discharges. *See, e.g.*, 66 Fed. Reg. 2960, 3015-16 (Jan. 12, 2001) (EPA "interprets the Clean Water Act to apply to discharges of pollutants from a point source via ground water that has a direct hydrologic connection to surface water"; excluding such discharges "would . . . be inconsistent with the overall Congressional goals expressed in the statute.");[5] 63 Fed. Reg. 7858, 7881 (Feb. 17, 1998) ("EPA interprets the CWA's NPDES permitting program to regulate discharges to surface water via groundwater where there is a direct and immediate hydrologic connection"); 56 Fed. Reg. 64876, 64892 (Dec. 12, 1991) ("the Act requires NPDES permits for discharges to groundwater where there is a direct hydrological connection between groundwaters and surface waters. In these situations, the affected groundwaters are not considered 'waters of the United States' but discharges to them are regulated because such discharges are effectively discharges to the directly connected surface

[4] In their Motion to Dismiss, Defendants assert that this decision is based largely on *Hawai'i Wildlife Fund v. Cty. of Maui*, 24 F. Supp. 3d 980 (D. Haw. 2014). In fact, the court in *Yadkin* cites six cases from district courts in the Ninth, First, and Eighth Circuits, as well as several EPA regulations to support its reasoning about groundwater that is hydrologically connected to surface waters. *Yadkin*, 141 F. Supp. 3d at 444-45.

[5] Defendants assert that EPA reversed course on this issue in the final version of the rule, but this is not true. The EPA merely declined to institute national technology-based standard for CAFOs discharging to surface water through hydrologically connected groundwater due to site-specific variations. 68 Fed. Reg. 7176, 7216 (Feb. 12, 2003). The EPA then clarified that "nothing in the 2003 rule was to be construed to expand, diminish, or otherwise affect the jurisdiction of the CWA over discharges to surface water via groundwater that has a direct hydrologic connection to surface water." 73 Fed. Reg. 70418, 70420 (Nov. 20, 2008). In other words, the EPA has consistently maintained that, while groundwaters are not "waters of the United States," discharges of pollutants through groundwater to jurisdictional surface waters are subject to the NPDES program.

waters."); 55 Fed. Reg. 47990, 47997 (Nov. 16, 1990) (stormwater rules cover hydrologically connected groundwater).

Defendants' contention that the direct-hydrological-connection standard is at odds with the recent "Waters of the United States Rule" misinterprets EPA's position. The Rule expressly excludes groundwater from the definition of "waters of the United States." 80 Fed. Reg. 37054, 37073 (Aug. 28, 2015). But, as EPA has repeatedly clarified, even though groundwater by itself is not covered by the Clean Water Act, the Clean Water Act does encompass pollutant discharges that reach waters of the United States through groundwater:

> EPA agrees that the agency has a longstanding and consistent interpretation that the Clean Water Act may cover discharges of pollutants from point sources to surface water that occur via ground water that has a direct hydrologic connection to the surface water. Nothing in [the Waters of the United States Rule] changes or affects that longstanding interpretation, including the exclusion of groundwater from the definition of 'waters of the United States.'

See EPA, *Response to Comments—Topic 10 Legal Analysis*, 386 (June 30, 2015); http://www.epa.gov/cleanwaterrule/response-comments-clean-water-rule-definition-waters-united-states.

Defendants erroneously ignore the role that groundwater can play as the pathway through which pollutants reach jurisdictional surface waters. EPA's longstanding interpretation of the scope of the Clean Water Act is entitled to deference. *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 865 (1984); *accord Decker v. Nw. Envtl. Def. Ctr.*, 133 S.Ct. 1326, 1331, 1337 (2013).

Defendants cite a handful of cases that are beside the point. While those cases affirm the uncontroversial notion that groundwater itself is not a "water of the United States" protected under the Clean Water Act, they do not contradict the view of the vast majority of courts that the discharge of pollutants through close hydrologic connection to protected surface waters is

covered by the Clean Water Act. In *Village of Oconomowoc Lake v. Dayton Hudson, Corp.*, the court examined only whether groundwater itself was a navigable water, *i.e.*, a water within the meaning of the Clean Water Act. 24 F.3d 962, 965 (7th Cir. 1994); *see also Chevron U.S.A. Inc. v. Apex Oil Co., Inc.*, 113 F. Supp. 3d 807, 816 (D. Md. 2015) (holding that groundwater is not a "navigable water" for purposes of liability under the Oil Pollution Act). That question is entirely different from the question whether the Clean Water Act is violated when pollutants travel to and contaminate jurisdictional surface waters through groundwater with a direct hydrological connection. Similarly, in *Rice v. Harken Exploration Co.*, the court ruled on the coverage of groundwater by a different statute, and noted in dicta only that groundwater is not a navigable water of the United States under the Clean Water Act. 250 F.3d 264, 269 (5th Cir. 2001). Moreover, in that case the plaintiffs failed to provide any "evidence of a close, direct and proximate link between [the defendant's] discharges of oil and any resulting actual, identifiable oil contamination of a particular body of natural surface water" – the polar opposite of this enforcement action. *Id.* at 272.

Defendants' incorrect use of precedents is illustrated by their reliance upon *Umatilla Waterquality Prot. Ass'n v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312 (D. Ore. 1997). That United States District Court has subsequently expressly disavowed this decision. "[C]ontrary to *Umatilla*, the CWA covers discharges to navigable surface waters via hydrologically connected groundwater." *Nw. Envtl. Def. Ctr. v. Grabhorn, Inc.*, No. CV-08-548-ST, 2009 WL 3672895, at *11 (D. Or. Oct. 30, 2009).

Similarly, Defendants cite only footnote dicta from a decision of the Tenth Circuit, which does not address a direct hydrologic connection as presented in this case. *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1141 n.4 (10th Cir. 2005). What Defendants fail to point out is

that the Tenth Circuit has firmly upheld the jurisdiction of the Clean Water Act over surface water pollution conveyed by hydrologically connected groundwater. *Quivira Mining Co. v. EPA*, 765 F.2d 126, 130 (10th Cir. 1985). As a District Court in that Circuit has stated, "the Tenth Circuit's expansive construction of the Clean Water Act's jurisdictional reach [in the *Quivira* case] ***foreclose[s] any argument that the CWA does not protect groundwater with some connection to surface waters***," and "most courts to have considered the issue have held that hydrologically connected groundwaters are regulated waters of the United States." *Friends of Santa Fe Cty. v. LAC Minerals*, 892 F. Supp. 1333, 1357–58 (D.N.M. 1995) (emphasis added).

Defendants also misstate the law in the Seventh Circuit, claiming that that court denies Clean Water Act jurisdiction over hydrologically connected discharges. Defendants cite a case dealing with Clean Water Act jurisdiction over groundwater *per se*, *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965-66 (7th Cir. 1994), while failing to mention the Seventh Circuit's ruling that the Clean Water Act "authorizes EPA to regulate the disposal of pollutants into deep wells, at least ***when the regulation is undertaken in conjunction with limitations on the permittee's discharges into surface waters***." *U.S. Steel Corp. v. Train*, 556 F.2d 822, 852 (7th Cir. 1977) (emphasis added), *overruled on other grounds by City of W. Chicago v. U.S. Nuclear Regulatory Comm'n*, 701 F.2d 632, 644 (7th Cir. 1983).

Finally, Defendants erroneously claim that the Fifth Circuit supports their view, when in fact the Fifth Circuit expressly has declined to reach the issue. *Exxon Corp. v. Train*, 554 F.2d 1310, 1312 n.1 (5th Cir. 1977) (holding limited to situation where EPA did ***not*** assert that discharge to groundwater was polluting surface waters). The Fifth Circuit case cited by Defendants found that the mostly dry "seasonal streams" alleged to be polluted by discharges through groundwater were not jurisdictional ***surface*** waters under the Oil Pollution Act, and the

Court rested its decision on the fact that, as to the only nearby jurisdictional surface water, the plaintiffs had not produced "evidence of a close, direct and proximate link between Harken's discharges of oil and any resulting actual, identifiable oil contamination of a particular body of natural surface water." *Rice v. Harken Expl. Co.*, 250 F.3d 264, 270-72 (5th Cir. 2001). That is exactly what the Conservation Groups have alleged in this case. The Fifth Circuit panel did not reach the question of whether pollution of jurisdictional surface waters via hydrologically connected groundwater is subject to enforcement under the Clean Water Act; thus, the decision in that case does not support Defendants' motion.

Here, the Conservation Groups do not contend that the groundwater flowing beneath the Spill Area is itself subject to regulation, but that it is a conduit for Defendants' illegal discharges to Brown's Creek, Cupboard Creek, and surrounding wetlands, which are waters of the United States that fit squarely within the Clean Water Act's coverage.[6] There is a close, direct hydrologic connection between the Spill Area (which is directly upgradient of the waterways)

[6] Defendants argue that the Conservation Groups never allege a discharge into a "navigable water." Defs' Mot. to Dismiss at 15. That is false. The term, "waters of the United States," includes not only traditional navigable waters, but also other water features that maintain a sufficient connection with "waters of the United States" in their own right, under standards provided by regulations, 33 C.F.R. § 328.3(a), and articulated by the Supreme Court in *Rapanos v. United States*, 547 U.S. 715 (2006). In the Complaint, Conservation Groups allege that Browns Creek and Cupboard Creek are waters that flow into Broadway Lake, Lake Secession, Lake Russell, and the Savannah River. The Savannah River is an interstate waterway, and these waters are all clearly "waters of the United States." In addition, the Conservation Groups allege in the Complaint that the wetlands are "adjacent" to Browns and Cupboard Creek – precisely the category of wetlands that are covered as "waters of the United States." *Precon Dev. Corp. v. Army Corps of Engineers*, 603 F. App'x 149, 150–51 (4th Cir. 2015) (discussing Kennedy's concurrence in *Rapanos*, 547 U.S. at 779). And, even if the wetlands at issue in this case are not "waters of the United States," a point source does not need to discharge directly into navigable waters to trigger NPDES permitting. Because Congress did not limit the term "discharges of pollutants" to only direct discharges to navigable waters, discharges through wetlands may fall within the purview of the Clean Water Act according to the United States. *See Rapanos*, 547 U.S. at 743.

and the nearby waterways and wetlands, which are waters of the United States. These waterbodies are all within 1,000 feet of the release point and in the direction of primary groundwater flow. Compl. ¶ 11. The Spill Site contains numerous hazardous petroleum compounds, including benzene, toluene, ethylbenzene, xylenes, methyl tert-butyl ether, and naphthalene, *id.* ¶¶ 10, 14–15, which have been found in increasing levels in Browns Creek, *id.* ¶ 24. Therefore, the discharges from the Area via groundwater are unpermitted point sources.

II. No Abstention under the Primary Jurisdiction Doctrine or the *Burford* Doctrine is Warranted.

Defendants attempt to use the "primary jurisdiction" doctrine – which is not mentioned in the Clean Water Act itself – to block this Clean Water Act enforcement action. This tactic has been tried by defendants before to stall Clean Water Act enforcement, and rejected by the courts. *E.g. Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428, 449-451 (M.D.N.C. 2015); *Ohio Valley Envtl. Coal, Inc. v. Coal-Mac*, 775 F. Supp. 2d 900, 919 (S.D.W. Va. 2011).

Defendants rely upon DHEC administrative proceedings to make their primary jurisdiction argument. Yet, when given 60-day notice of the Conservation Groups' intent to file this Clean Water Act enforcement action, DHEC did not file its own Clean Water Act suit to pre-empt the Conservation Groups. In the Clean Water Act itself, Congress expressly provided that in the absence of such a state agency judicial enforcement proceeding, citizens may enforce the Clean Water Act by bringing an enforcement action like this one. 33 U.S.C. § 1365. In other words, Defendants are attempting to use the "primary jurisdiction" doctrine to undo the express language that Congress enacted in the Clean Water Act.

Further, courts "should be reluctant to invoke the doctrine," and "should not" invoke it in a case where Congress has decided that the courts should consider the issue in the first instance – as Congress expressly decided in the Clean Water Act. *Mississippi Power & Light Co. v. United Gas Pipeline Co.*, 532 F.2d 412, 419 (5th Cir. 1976); *see also Baykeeper v. NL Indus., Inc.*, 660 F.3d 686, 691 (3rd Cir. 2011) ("'the court must not abdicate its responsibility'").

There is nothing to suggest that any ruling by this Court would interfere with the state's release, response, and corrective action process under its Underground Storage Tank Control Regulations. Indeed, DHEC received notice of the Conservation Groups' intent to file suit and made no attempt to file its own enforcement action to pre-empt the Conservation Groups' suit.

Congress has specifically tasked federal courts with determining whether Defendants are releasing pollutants into waterbodies in violation of the Clean Water Act. The no-discharge standard of the Clean Water Act is different from the South Carolina regulations requiring owners and operators responsible for a petroleum spill to "submit[] a plan that provides for adequate protection of human health and the environment as determined by the Department." S.C. Code Ann. Regs. 61-92 § 280.66.

In addition, contrary to Defendants' assertions, the state oversight process will not be adequate to fully protect Conservation Groups' rights because the state process will not determine Defendant's liability for violations of the federal Clean Water Act and will allow pollution to continue for an extended time in the future. Also, the state oversight process will not determine Defendants' liability for Congressionally-prescribed Clean Water Act penalties, which are designed to penalize and discourage Clean Water Act violations like the Defendants' pollution of the Savannah River Basin.

Defendants point to DHEC's "command over the investigation and remediation" of the pipeline release – and specifically to DHEC's oversight of the Corrective Action Plan and convening of a community information meeting. Defs' Mot. to Dismiss at 26. But Defendants neglect to mention that the Corrective Action Plan was submitted more than half a year after it was initially due, Compl. ¶ 35, that Defendants have missed several other important deadlines, *id.*, and that DHEC's January 2017 community information meeting was the first time in over two years since the spill was discovered that members of the Anderson County community had the chance to meet with agency officials to express concerns.

Further, that meeting occurred only ***after*** the Conservation Groups conducted their investigation, sent out their Clean Water Act 60 Day Notice, and filed this suit. That meeting occurred only after the public attention these efforts attracted. And this meeting – held only after the efforts of the Conservation Groups – was the first public meeting held either by DHEC or Kinder Morgan in the affected community. In fact, to date, Kinder Morgan has yet to hold a public meeting with residents of the area.

Defendants have succeeded in stalling the process so far and openly admit that DHEC's remediation will "likely span over 10 years." Defs' Mot. to Dismiss at 25. The relief Conservation Groups seek in this action is ***not*** the same as the relief they seek from DHEC, and the relief sought here – an injunction, civil penalties,[7] and reasonable fees – is specifically

[7] No matter how the process with DHEC plays out, if this Court finds Defendants liable for Clean Water Act violations, it would still need to resolve penalties even if Defendants cease discharging pollutants at the site. *See Bldg. & Const. Trades Council of Buffalo v. Downtown Dev., Inc.*, 448 F.3d 138, 152 (2d Cir. 2006) ("We hold . . . that a defendant's ability to show, after suit is filed but before judgment is entered, that it has come into compliance with limits on the discharge of pollutants will not render a citizen suit for civil penalties moot.).

intended to ensure that Defendants completely stop violating the Clean Water Act, hasten the remediation of this spill, and prevent other similar spills in the future.

Nor are there grounds for abstention under the *Burford* doctrine. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). *Burford* abstention marks an "extraordinary and narrow exception to the duty of the [d]istrict [c]ourt to adjudicate a controversy properly before it." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728, (1996) (citations omitted). Courts routinely recognize that because the Clean Water Act citizen suit provision is intended to supplement state government actions, the *Burford* doctrine is essentially inapplicable in this context. *See, e.g., Ohio Valley Envtl. Coal., Inc. v. Coal-Mac*, 775 F. Supp. 2d 900, 918 (S.D.W. Va. 2011) ("*Burford* abstention does not apply in these cases."); *Cmty. of Cambridge Envtl. Health & Cmty. Dev. Grp. v. City of Cambridge*, 115 F. Supp. 2d 550, 560–61 (D. Md. 2000) (to apply the *Burford* doctrine to Clean Water Act citizen suits would essentially derogate the policy choices made by Congress); *Culbertson v. Coats Am., Inc.*, 913 F. Supp. 1572, 1578 (N.D. Ga. 1995); *Natural Res. Def. Council, Inc. v. Outboard Marine Corp.*, 692 F. Supp. 801, 810 (N.D. Ill. 1988); *Brewer v. City of Bristol*, 577 F. Supp. 519, 524 (E.D. Tenn. 1983) (citations omitted).

Here, if the Court were to abstain under *Burford* "it would be neglecting its duty to ensure that the federal law requirements are complied with, and it would deny Plaintiff[] a forum for [its] citizen enforcement suit." *Coal-Mac*, 775 F. Supp. 2d at 918. While South Carolina has established a process to oversee clean-up actions, this review scheme is "intertwined with an issue of national concern, the regulation of water pollution." *Id.* The Court's ruling in this action will not disrupt South Carolina's efforts to establish a coherent environmental policy. *Id.* Moreover, "separating federal issues from state law issues is simple in this case because there are no difficult questions of state law presented. Plaintiffs have not pled any state law claims."

Oregon State Pub. Int. Res. Grp., Inc. v. Pac. Coast Seafoods Co., 341 F. Supp. 2d 1170, 1178 (D. Or. 2004).

In fact, what is clear is that Defendants want to avoid enforcement of the Clean Water Act by the Conservation Groups. The Act provides substantial penalties, and invokes the authority of the federal courts to require that water pollution be stopped. That is exactly what the Clean Water Act intends and what is necessary to protect the waters of the United States, the Savannah River Basin, and Anderson County from Defendants' ongoing gasoline pollution.

CONCLUSION

For all of these reasons, Defendants' Motion to Dismiss must be denied.

This the 13th day of March, 2017.

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