RECORD NO. 17-1640

In The
United States Court of Appeals
For The Fourth Circuit

UPSTATE FOREVER; SAVANNAH RIVERKEEPER,

Plaintiffs – Appellants,

v.

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

Defendants – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA AT ANDERSON

RESPONSE BRIEF FOR DEFENDANTS – APPELLEES KINDER MORGAN ENERGY PARTNERS, L.P. AND PLANTATION PIPE LINE COMPANY, INC.

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

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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,

Plantation Pipe Line Company, Inc.
(name of party/amicus)

who is Appellee, 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:

Plantation Pipe Line Company, Inc. is 51% owned by Kinder Morgan Energy Partners, L.P. and 49% owned by ExxonMobil Corporation.
Kinder Morgan Energy Partners, L.P. is 100% owned by Kinder Morgan G.P., Inc.
Kinder Morgan, G.P., Inc. is 100% owned by Kinder Morgan, Inc.

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:

Plantation Pipe Line Company, Inc. is 51% owned by Kinder Morgan Energy Partners, L.P. and 49% owned by ExxonMobil Corporation.

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:

None that are not identified in number 2.

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 Richard E. Morton Date: 6/2/2017

Counsel for: Plantation Pipe Line Company, Inc.

CERTIFICATE OF SERVICE

****

I certify that on 6/2/2017 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 Richard E. Morton 6/2/17
(signature) (date)

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STATEMENT OF THE CASE[1]

I. THE NOVEMBER 2014 RELEASE.

Kinder Morgan Energy Partners L.P. ("KMEP") is the majority owner and operator of Plantation Pipe Line Company ("PPL") (collectively referred to as "PPL"). The Plantation Pipe Line is a 3,100-mile pipeline network that originates in Louisiana and ends in Washington, D.C. ("the "Pipeline") (App. 7, Compl., ¶ 4.)

In early December 2014, PPL learned that a permanent repair sleeve on a portion of the Pipeline located in Anderson County, South Carolina had failed and

[1] KMEP and PPL believe that Plaintiffs' Statement of the Case is inadequate to fully set forth the factual matters underlying the legal issues in this case pursuant to Fed. R. App. P. 28.

spilled approximately 370,000 gallons of gasoline and petroleum products.[2] (*See* DHEC Website.)[3] The leakage – which was located approximately six to eight feet below ground – was discharged into the soil and not directly discharged into any body of water.[4] (*See* App. 83, 3/5/15 Interim Corrective Action Plan.) Within a matter of days, PPL fully repaired the Pipeline. (S*ee* App. 83, Interim CAP; App. 99, 9/26/16 Revised CSA Report.) PPL also took immediate action to investigate the extent of the release and to remediate the release. (*See* DHEC Website.) In 2015, PPL removed more than 209,000 gallons of gasoline and petroleum products from the site. (App. 7, Compl., ¶ 8.) Those remediation efforts continue today under DHEC's oversight. (*See* DHEC Website (follow "Response and Assessment Actions" hyperlink)).

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[2] The release from the Pipeline ("product" or "petroleum product") was composed of approximately five parts gasoline and one part diesel.

[3] The South Carolina Department of Health and Environmental Control ("DHEC") created a public website regarding the release, which is publicly available and thus the subject to judicial notice in this case. *See Philips v. Pitt Cty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009) ("In reviewing a Rule 12(b)(6) dismissal, [a court] may properly take judicial notice of matters of public record."). Though not included in Plaintiffs' Appendix, DHEC's website was cited to the District Court. (*See* App. 52, Mot. to Dismiss Br.) The website is available at http://scdhec.gov/HomeAndEnvironment/Pollution/CleanUpPrograms/OngoingProjectsUpdates/PlantationPipeline/ (last visited August 30, 2017).

[4] The site was comprised of two parcels of land owned by two private parties. PPL purchased one parcel shortly after the release was discovered. The other parcel owners filed a separate lawsuit against KMEP, PPL, and others. The Parties entered into a confidential settlement on August 1, 2017.

There are two streams – Browns Creek and Cupboard Creek – and two wetlands located on the site. (App. 8, Compl., ¶ 11.) The Pipeline did not, and never has, discharged any gasoline, petroleum product, or any other pollutant directly into either of these bodies of water.

II. DHEC'S OVERSIGHT OF PPL'S ONGOING REMEDIATION EFFORTS.

Shortly after the release, DHEC directed PPL to investigate the extent of the impact and to implement remedial actions to address its effects. Since that time, DHEC has been continuously overseeing PPL's remediation of the site. At DHEC's request, PPL has submitted multiple iterations of its Comprehensive Site Assessment ("CSA") and Corrective Action Plan ("CAP").

PPL submitted its initial CSA to DHEC on July 15, 2016, and a revised CSA on September 26, 2016. (*See* App. 87-190, CSA.) At that time, PPL had installed 98 temporary monitoring wells, 20 product recovery sumps, 15 recovery wells, two product recovery trenches, and 17 booms. (App. 96, CSA.) To date, PPL has removed more than 2,800 tons of contaminated soil and, as of June 2017, had recovered more than 222,732 gallons of petroleum product. (*See* DHEC Website (follow "Periodic Monitoring Reports" hyperlink; then follow "June 2017" hyperlink)). Recovery of the petroleum products is on-going at the site and surface water samples are collected monthly at multiple locations along Browns Creek. (*Id.*)

PPL also submitted an Interim CAP on March 5, 2015, and a completed CAP on September 1, 2016. (*See* App. 82-86, Interim CAP; App. 209-238, CAP.) The purpose of the CAP is to describe the proposed comprehensive plan to remediate the soil, groundwater, and surface water impacted by the release. (*See* App. 216, CAP.) DHEC published that CAP for public comment between October 21, 2016, and December 6, 2016. (*See* App. 240, DHEC's 1/27/17 Ltr. to PPL.) Plaintiffs were actively involved in that process and, on November 24, 2016, submitted detailed requests and concerns regarding the CAP directly to DHEC. (App. 191-205, Pl.'s 11/28/16 Ltr. to DHEC.)

On January 27, 2017, DHEC provided PPL with questions and comments for the proposed CAP and demanded a CAP Addendum within 30 days. (App. 240-257, DHEC's 1/27/17 Ltr. to PPL.) DHEC required that PPL incorporate nineteen (19) requests for additional information and action items into the CAP Addendum – including many identified by Plaintiffs in their November 28 letter. (App. 242, App. 244-257, DHEC's 1/27/17 Ltr. to PPL.)

On March 1, 2017, PPL submitted its CAP Addendum, which specifically addressed the issues that Plaintiffs raised during the public comment period. (*See* DHEC Website.) On May 25, 2017, PPL submitted an additional revision to the CAP (the "Revised CAP Addendum"). (*See* DHEC Website (follow "Corrective Action Plan" hyperlink; then follow "Corrective Action Plan Addendum Revision"

hyperlink).) Taken together, the CAP and the Revised CAP Addendum set forth the remedial technologies that are designed to abate any remaining impacts to the soil, groundwater, and Browns Creek and to prevent any future surface water impacts to Cupboard Creek.

Also on March 1, 2017, DHEC approved the Startup Plan for Surface Water Protection Measures: Revision 2 (the "Surface Water Protection Plan") for the site. (*See* App. 351, Weekly Startup Status Update.) PPL implemented this plan on March 6, 2017. (*Id.*) Pursuant to their Surface Water Protection Plan, PPL has now taken additional remedial actions, including: (1) installing reactive core mats at the two seeps identified near Browns Creek; and (2) initiating the biosparging system for each of the vertical sparging wells and in the two diffusion aerators in Browns Creek. (*See* App. 315-316, CH2M's 1/20/17 Ltr. to DHEC.) These remedial measures are designed and engineered to eliminate existing petroleum impacts to Browns Creek and to prevent additional constituents on the site from impacting Browns and Cupboard Creeks. (*See id.*)

III. PLAINTIFFS' CLAIMS.

It is undisputed the Pipeline did not, and never has, discharge any gasoline, petroleum product, or any other pollutant directly into Browns Creek or Cupboard Creek. It is further undisputed the Pipeline leak was repaired in December 2014, and there have not been any recurring leaks since that time.

Plaintiffs' Complaint contends that jurisdiction under the Clean Water Act ("CWA") exists because Browns Creek and Cupboard Creek "are located in the path of groundwater flow from the spill site." (App. 7, Compl., ¶ 11.) Thus, the Complaint claims the remaining product in the soil and groundwater "ha[s] moved toward both streams and wetlands since the spill was first discovered, and [ ] continue[s] to move to the streams and wetlands." (App. 8, Compl., ¶ 16.) In response to this "movement," Plaintiffs contend that DHEC's oversight and enforcement of the remediation effort is inadequate and insufficient. Thus, Plaintiffs seek to utilize the District Court's power to impose injunctive relief in order to enforce their own remediation standards in lieu of South Carolina's regulatory requirements. (*See* App. 23-25, Compl.; App. 78, Mot. to Dismiss Br.) Significantly, Plaintiffs' requests for injunctive relief are nearly identical to their requests to DHEC in their November 28 letter, requests that were considered by the agency in its oversight of PPL's remediation action and plans. (*Compare* App. 23-24, Compl., *with* App. 191-205, Pl.'s 11/28/16 Ltr. to DHEC.) DHEC has not imposed all of those requests without modification, and Plaintiffs filed an action under the "citizen suit" provisions of the CWA (*i.e.*, 33 U.S.C. § 1365) in an effort to supersede DHEC's authority.

IV. THE DISTRICT COURT'S DECISION.

PPL moved to dismiss Plaintiffs' Complaint on a number of grounds, including for lack of subject matter jurisdiction and for failure to state a claim.[5] After briefing, including the receipt of amici briefs, the District Court granted PPL's motion and dismissed Plaintiffs' Complaint in its entirety.

The District Court found inadequate Plaintiffs' allegation that the repaired leak qualified as a "point source" of pollutants into navigable waters which would require a permit under the CWA. Noting that "'[n]onpoint source pollution is generally excluded from CWA regulation and is left to the states,'" (App. 415, District Ct. Op. at 6 (*quoting Sierra Club v. BNSF Ry. Co.*, No. C13-967-JCC, 2016 WL 6217108, at *8 (W.D. Wash. Oct. 25, 2016))), the District Court found several reasons why it lacked jurisdiction and why Plaintiffs' "point source" allegation was insufficient as a matter of law. First, it noted that Plaintiffs did not (and could not) contend that the Pipeline was still leaking. (*Id.*) Thus, while a pipeline could clearly be a potential "point source," here there was no allegation that leakage from the November 2014 release had "discharged petroleum directly into navigable waters." (App. 416, District Ct. Op. at 7.) The District Court also found that Plaintiffs could only allege that "there are continuing *effects*" from the

[5] In addition to the grounds for dismissal that form the basis for this appeal, Defendants sought dismissal based on the grounds of primary jurisdiction and *Burford* abstention, neither of which were addressed by the District Court.

wholly ***past*** November 2014 Release, and that, at some point, these "effects" could impact a navigable water. However, the District Court found that these effects do not amount to "point source" discharge "directly" into the navigable waters of the United States so as to deprive the State of South Carolina of its regulatory authority and enable this kind of citizen suit. Indeed, the Complaint plainly alleged only a past discharge, rather than a present and continuing violation. As the District Court noted:

> At best, with respect to the pipeline, the Plaintiffs have alleged a past discharge of pollutants into the soil and groundwater that may migrate into navigable waters, which is insufficient to state a plausible claim that the pipeline is a point source in this case or that the pipeline will discharge pollutants into navigable waters.

(App. 417, District Ct. Op. at 8.)

Similarly, Plaintiffs' contentions regarding the spill site, and any seeps, flows, or fissures from it, did not establish that these were point sources. Noting that a point source must be a "discernable, confined, and discrete" conveyance under the CWA, 33 U.S.C § 1362(14), the District Court found that there was no allegation that PPL acted to "channel or direct contaminants to navigable waters and there is no discrete mechanism conveying the pollutants to navigable waters." (App. 419, District Ct. Op. at 10.) To the contrary the District Court found that PPL "ha[s] undertaken efforts to remediate the spill site." (*Id.*) Thus, while Plaintiffs may have alleged enough to establish a discrete source for the pollution,

they had failed to allege a discrete conveyance of pollutants into navigable waters such that federal jurisdiction would exist. (App. 420-421, District Ct. Op. at 11-12.)

The District Court then addressed Plaintiffs' claim that the pollutants from the wholly past November 2014 Release were discharged into groundwater that was "hydrologically connected" to navigable waters[6] within the jurisdiction of the CWA. While Plaintiffs conceded that groundwater, by itself, is not within the jurisdiction of the CWA as a "water of the United States," the allegation of a "hydrological connection" was, according to Plaintiffs, sufficient to confer such jurisdiction. Noting a split among the courts within this Circuit, along with the absence of a definitive opinion from this Court, and after a survey of other decisions, the District Court concluded that such a claim was too broad, based in large part on the statutory distinction between "navigable waters" and "ground water." As the District Court noted:

> To find that the pipeline directly discharged pollutants into the navigable waters under the facts alleged would result in the CWA applying to every discharge into the soil and groundwater no matter its location. All groundwater potentially flows downstream and will possibly at some point enter navigable waters. . . .

(App. 417, District Ct. Op. at 8.)

[6] The District Court used the term "navigable waters" to refer to waters of the United States that are subject to the CWA. Other courts cited below use the term "surface waters" and thus both terms are used synonymously to refer to waters of the United States that are subject to the CWA.

Thus, and put simply, the District Court based its decision in this part of the case on the reality that since nearly all groundwater eventually flows to navigable waters, a mere allegation of a "hydrological connection" would eviscerate the statutory distinction between the two, and would effectively sweep all groundwater into the definition of "navigable water" under the CWA.

Plaintiffs now ask this Court to find that the CWA authorizes them to supplant state-approved and supervised remediation efforts because the pollutants from a wholly past and discrete leak, which were released into the ground and not into any navigable water, may migrate to navigable water via hydrologically connected groundwater.

SUMMARY OF ARGUMENT

The CWA regulates discharges into "navigable waters" and "is the principal legislative source of the [Environmental Protection Agency's ("EPA")] authority—and responsibility—to abate and control water pollution." *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 491 (2d Cir. 2005). The EPA administers the CWA primarily through the National Pollutant Discharge Elimination System ("NPDES").

As used in the CWA, "'navigable waters' means the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The CWA does not expressly regulate groundwater or discharges to groundwater.

"Generally speaking, the NPDES requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the Nation's waters." *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004). Absent an NPDES permit, it is a violation of the CWA for any person to discharge any pollutants into the waters of the United States from a point source (*i.e.*, a discrete conveyance to those waters) without an NPDES permit. 33 U.S.C. §§ 1311(a), 1342(a), 1365(f)(6). Pursuant to 33 U.S.C. §§ 1251(b), 1342), the states may apply for authority to administer the NPDES program within their borders. If the agency charged with enforcing the CWA fails to remedy that violation, a citizen is permitted to file suit in federal court seeking injunctive relief and statutory penalties. Such suits, however, cannot be filed for past violations of the CWA. Instead, citizens suits must seek to address an ongoing violation.

In this case, Plaintiffs seek to apply the provisions of the CWA to a pipeline spill that occurred nearly three years ago which did not directly discharge any pollutants into any navigable water. They do so notwithstanding the state agency charged with environmental regulation (DHEC) has been overseeing PPL's remediation of the site, which efforts have been ongoing since the release was discovered. Plaintiffs' primary motivation in initiating this action is their opinion that DHEC's regulatory oversight has been inadequate.

In order to supplant DHEC's regulatory authority, Plaintiffs claim the November 2014 Release caused pollutants to enter the groundwater, those pollutants are migrating towards navigable waters, and, consequently, the migration results in pollutants being added to those waters. Plaintiffs claim that PPL is in violation of the CWA because it has not obtained a permit for the "discharge" of the pollutants through the groundwater and into navigable waters, notwithstanding the fact that there is no ongoing discharge from the pipeline. Thus, despite the fact that the pipeline has not leaked for nearly three years, Plaintiffs claim there is an ongoing discharge of pollutants for which PPL does not have a permit. (*See* App. 18, Compl. ¶ 49-50.) Plaintiffs further claim that the Pipeline was the necessary "point source" when it leaked three years ago and the groundwater acts as a "conveyance" to navigable waters. Alternatively, Plaintiffs argue that groundwater that is alleged to be "hydrologically connected" to navigable waters is subject to CWA jurisdiction and pollutants in such groundwater constitute a violation of the CWA and Plaintiffs may file their lawsuit.

If permitted to stand, Plaintiffs' theories would effectively eradicate much of the states' role and jurisdiction in the regulation of groundwater and the environment. Under Plaintiffs' various theories, ***any*** spill of any pollutant ***anywhere*** may be subject to CWA permitting, even if it occurs miles from a

navigable water. This is so because, unless it is intercepted or perched,[7] all groundwater eventually flows to some navigable water. Moreover, since these flows can take significant periods of time, a one-time discharge that lasted even minutes is potentially subject to this type of citizen suit for years thereafter.

The simple reality is the CWA's jurisdictional reach is not boundless. It regulates discharges into navigable waters, but does not regulate groundwater. Moreover, citizen suits may only address ongoing violations, not violations that occurred in the past. The ingenuity of counsel in creating "hydrological connected groundwater" as a term wholly distinct from groundwater cannot redefine the limits of this jurisdiction.

The District Court properly rejected Plaintiffs' attempt to make the reach of citizen suits under the CWA without principled bounds. This Court should do the same.

STANDARD OF REVIEW

Plaintiffs conflate the standard of review in this matter to that which is applicable only to Motions to Dismiss brought pursuant to Fed. R. Civ. P. 12(b)(6). In so doing, they fail to acknowledge the District Court found that it lacks subject matter jurisdiction, and ***they*** bear the burden of proving the existence of subject

[7] Perched water is an accumulation of groundwater located above a water table in an unsaturated zone. It is subsurface water trapped in a lens of more porous material surrounded by impermeable material in the unsaturated zone above the water table.

matter jurisdiction. *See Lovern v. Edwards*, 190 F.3d 648, 654 (4th Cir. 1999). When a defendant challenges subject matter jurisdiction, "the district court is to regard the pleadings' allegations as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991). The court should grant a Rule 12(b)(1) motion "if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Evans v. B.F. Perkins Co., a Div. of Standex Int'l Corp.*, 166 F.3d 642, 647 (4th Cir. 1999). Thus, while the District Court's decision is reviewed by this Court on a *de novo* basis, *see Sucamp Pharm., Inc. v. Astellas Pharma, Inc.*, 471 F.3d 544, 550 (4th Cir. 2006) ("We review a district court's grant of a motion to dismiss under Rule 12(b)(1), (3), or (6) de novo."), Plaintiffs are not entitled to a review in which their allegations of subject matter jurisdiction are "accept[ed] as true." (App. Brief at 8.) Moreover, even under the more deferential standard of review provided by Rule 12(b)(6), conclusory allegations made by Plaintiffs are "not entitled to be assumed true." *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009). Nor should the Court "accept as true allegations that contradict matters properly subject to judicial notice or by exhibit." *Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002) (internal quotation marks omitted).

ARGUMENT

Plaintiffs' claims are founded on a single, accidental release of petroleum from the Pipeline into the soil on the site in November 2014. That leak was repaired immediately after it was discovered. There has been no additional product released from the Pipeline at the site since that time. DHEC has been actively overseeing PPL's remediation of the site, and will continue to do so until the effects of the release at issue have been remediated and DHEC determines that no further action is required. It was not until 2016 – two years after the spill occurred, the pipeline was repaired, and remediation work under DHEC's supervision had begun – that Plaintiffs concluded the clean-up plan was inadequate from their perspective.[8] (App. Br. at 6)

To establish a violation of the CWA, Plaintiffs must allege: (1) the discharge (*i.e.*, addition); (2) of a pollutant; (3) into navigable waters; (4) from a point source; (5) without a permit. *Assateague Coastkeeper v. Alan and Kristin Hudson Farm*, 727 F. Supp. 2d 433, 444 (D. Md. 2010) (quoting *Comm. to Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 308 (9th Cir. 1993)). A party is only "in violation" of the CWA if all five of these elements are present at

[8] Plaintiffs are conservation groups whose total membership is not disclosed. Similarly, there is no disclosure of the number of members who live in the affected area or even who live in South Carolina. (App. 15-16, Compl.). Thus, it is not clear whether the opinion that the clean-up is inadequate is the opinion of one person, 100 people, or is held by anyone who actually lives in the area of the spill.

the same time. Moreover, the Supreme Court has made plain that: (1) the CWA does not confer jurisdiction over citizen suits that are based on "wholly past" violations; and (2) the CWA's purpose in authorizing citizen suits is "to abate pollution when the government cannot or will not command compliance." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 62, 67 (1987).

The District Court in this case correctly recognized that Plaintiffs' Complaint is deficient in each of three fatal ways. First, the District Court found it lacked subject matter jurisdiction over the November 2014 Release because it is a wholly past violation of the CWA that cannot give rise to a citizen suit. (*See* App. 414-418, District Ct. Op.) Second, it determined, to the extent Plaintiffs alleged an "ongoing discharge," that discharge was not actionable under the CWA because there are no point sources conveying pollutants to Browns Creek or Cupboard Creek. (App. 418-421, District Ct. Op.) Finally, the District Court rejected Plaintiffs' argument regarding CWA jurisdiction over discharges into groundwater that is hydrologically connected to a navigable water.[9] (App. 421-425, District Ct. Op.) All of these conclusions are correct.

[9] This Court need not reach this hydrological connection issue if it determines, as it should, that the November 2014 discharge from the Pipeline is a "wholly past" violation that cannot give rise to a CWA citizen suit, and that the "Spill Site" is not a point source under the CWA.

I. THE DISTRICT COURT PROPERLY CONCLUDED IT LACKED SUBJECT MATTER JURISDICTION OVER THE NOVEMBER 2014 RELEASE FROM THE PIPELINE.

There is no dispute that, in November 2014, a pollutant (*i.e.*, petroleum product) was released at the site. There is also no dispute that "a pipeline can be a point source." (App. 416, District Ct. Op.) The fatal flaw in the Plaintiffs' Complaint – which is also an undisputed fact – is that the Pipeline is not presently discharging anything and has not discharged anything for nearly three years. As the District Court correctly held, there is no subject matter jurisdiction because "there is no continuing discharge from the pipeline and the [Plaintiffs] have failed to allege any facts to support the position that the pipeline discharged petroleum directly into navigable waters."[10] (App. 416, District Ct. Op.)

A. The November 2014 Release Is Not Actionable Under the CWA Because It Is Neither Ongoing Nor Reasonably Likely to Occur Again.

The District Court's conclusion that it does not have jurisdiction over Plaintiffs' claims should be affirmed because it is supported by two unassailable and dispositive facts. First, the Pipeline was repaired shortly after the leak was discovered. Second, nothing has leaked out of the Pipeline or into the soil or

[10] The District Court did not – as Plaintiffs contend – "h[old] that the gasoline pipeline is not a point source." (*Contra* App. Br. at 8.) Rather, it held that, regardless of the Pipeline's status as a point source, it did not have jurisdiction because there was no ongoing discharge from the Pipeline into navigable waters. (App. 416, District Ct. Op.)

groundwater at the site in nearly three years. Thus, the discharge about which Plaintiffs complain is wholly past. The Supreme Court has expressly held that the CWA does not authorize citizen suits for violations that – like this one – are wholly past. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 62, 67 (1987).

1. The CWA Does Not Confer Jurisdiction for Wholly Past Violations.

The Supreme Court has held that a citizen suit can only be based on "a state of either continuous or intermittent violation – that is, a reasonable likelihood that a ***past*** polluter will continue to pollute in the future." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987) (emphasis added).

In *Gwaltney*, the plaintiffs filed a citizen suit against the defendant for repeatedly discharging pollutants that exceeded the effluent limitations set forth in its NPDES permit. *Id*. at 52. Those violations, however, were not ongoing at the time that the plaintiffs filed suit. *See id*. at 53. Significantly, the defendant had already installed new equipment to control and prevent discharges by the time the suit was filed. *Id*. at 53-54. The Supreme Court found that the CWA only authorizes citizen suits where the defendant is alleged "to be in violation" of the Act, and such language necessarily means that the CWA only authorizes citizen suits "to enjoin or otherwise abate an ongoing violation." *Id*. at 59. In other words, the CWA does not confer federal jurisdiction for citizen suits based upon

"wholly past violations." *Id*. at 67; *see also Highlands Conservancy v. E.R.O., Inc.*, No. A:90-0489, 1991 WL 698124, at *4 (S.D.W. Va. Apr. 18, 1991) ("[T]he Clean Water Act does not confer federal jurisdiction over citizen suits for wholly past violations."). Where – as is the case here – a complaint is devoid of allegations of "an ongoing violation," that complaint should be dismissed. *See, e.g.*, *Brewer v. Ravan*, 680 F. Supp. 1176, 1183 (M.D. Tenn. 1988) (dismissing the plaintiff's complaint because they "failed to make even a threshold good-faith allegation of continuous or intermittent violation of the CWA").

Plaintiffs' Complaint is based on a single release that occurred in November 2014, and that ceased nearly three years ago. (*See* App. 99, CSA; *see also* App. 83, Interim CAP.) Plaintiffs do not contend that there is an ongoing release of product ***from*** the Pipeline. Nor do they allege that this section of the Pipeline is likely to release product in the future. Rather, their Complaint alleges only there are continuing ***effects*** from a past discharge. Indeed, Plaintiffs now argue:

> [E]ven if the point source is no longer releasing gasoline, as long as the pollution discharged from the point source continues to flow into the waterway, Kinder Morgan remains in violation of the Clean Water Act.

(App. Br. at 11.) Significantly, Plaintiffs do not provide any authority to support this claim. Nor does any exist. To the contrary, of the two circuit courts that have addressed this issue, ***both*** have held that the effects of past discharges are insufficient to confer jurisdiction under the CWA because they do not satisfy the

CWA's current violation requirement. *See Conn. Coastal Fishermen's Ass'n v. Remington Arms. Co.*, 989 F.2d 1305, 1313 (2d Cir. 1993) (holding that the decomposition of previously discharged lead shotgun pellets in the Long Island Sound could not satisfy *Gwaltney*'s present violation requirement); *Hamker v. Diamond Shamrock Chem. Co.*, 756 F.2d 392, 397 (5th Cir. 1985) (finding that a single past discharge of oil with continuing effects on groundwater did not satisfy the CWA's present violation requirement).[11]

In *Hamker v. Diamond Shamrock Chem. Co.*, the Court of Appeals addressed a situation virtually identical to that presented here, and concluded dismissal was warranted because there was no ongoing violation. 756 F.2d at 397. The *Hamker* defendants owned a pipeline that leaked oil for a period of two weeks. *Id*. at 394. After the leak was discovered, the defendants' employees stopped it and sought to remediate the discharge. *Id.* The plaintiffs, however, alleged that those efforts were grossly inadequate and resulted in perpetuating rather than

[11] Though the Court of Appeals' decision in *Hamker* predates the Supreme Court's ruling in *Gwaltney* by approximately two years, the *Hamker* court interpreted the CWA in the same way that the *Gwaltney* court did – as requiring a present violation. *Compare Gwaltney*, 484 U.S. at 59 ("The harm sought to be addressed by the citizen suit lies in the present or the future, not in the past.") *with Hamker*, 756 F.2d at 397 ("By its ordinary meaning the language of section 1365 and the structure of the [CWA] convince us that a complaint brought under section 1365 must allege a violation occurring at the time the complaint is filed."). In fact, the Supreme Court granted certiorari in *Gwaltney* to resolve a "three-way conflict in the Circuits" regarding whether the CWA applied to wholly past violations and ultimately adopted the same interpretation used by the *Hamker* court. *Gwaltney*, 484 U.S. at 54-56, 59.

alleviating the contamination. *Id*. They also alleged – as Plaintiffs have here – that the defendants operated the pipeline negligently, and continued to do so. *Id*. The Court of Appeals upheld the district court's dismissal on subject matter jurisdiction grounds because there was no ongoing violation:

> Because the complaint here does not allege that Diamond Shamrock is "in violation" of an effluent standard, limitation or order, as required by section 1365, the Hamkers fail to state allegations sufficient to support jurisdiction in this case. The Hamkers, as they must, base their federal law claims on section 1365 of the [CWA], which permits citizen suits where the defendant is "alleged to be in violation of . . . an effluent standard or limitation under . . . [the CWA] or . . . an order issued by the Administrator or a State with respect to such a standard or limitation. . . ." 33 U.S.C. § 1365(a)(1). However, for the reasons discussed below, ***even if the Hamkers' complaint is liberally interpreted as alleging a past discharge of oil by Diamond Shamrock with continuing negative effects as well as continued negligent operation of the pipeline, the complaint does not satisfy section 1365's requirement that the defendant be alleged to be "in violation" of an effluent standard, limitation or order.***

Id. at 394-95 (emphasis added). This case is indistinguishable from *Hamker* and this Court should find no differently in upholding the District Court's decision to dismiss Plaintiffs' Complaint.

Plaintiffs argue that the District Court misread and misapplied the Court of Appeals' decision in *Hamker* because the plaintiffs' complaint in that case "did 'not allege a continuing discharge,' as does the Conservation Groups' Complaint." (App. Br. at 25 (quoting *Hamker*, 756 F.2d at 397)). Plaintiffs' conclusory allegation of a "continuing discharge" is neither binding nor dispositive,

particularly on a Rule 12(b)(1) motion where the allegations in a complaint are regarded "as mere evidence on the issue." *Richmond, Fredericksburg & Potomac R.R. Co.*, 945 F.2d at 768. The incontrovertible truth and undisputed fact in this case is that there is no "ongoing" discharge, only a single release from the Pipeline which was fully repaired long before Plaintiffs brought this action.

2. PPL Cannot Be "In Violation" of the CWA Because the Pipeline Has Been Repaired.

Plaintiffs wrongly contend that there need not be an ongoing release from the Pipeline, and PPL remains "in violation" of the CWA as long as product that was discharged in the past continues to migrate toward Browns Creek and Cupboard Creek. (App. Br. at 11-17.) Taken to its logical end, Plaintiffs essentially argue PPL is presently violating the CWA because it does not have a permit now for a discharge that occurred three years ago, from a pipeline that is not currently discharging anything. This illogical argument – requiring a defendant to obtain a permit or be in violation of the CWA for something that is no longer occurring – is based on a misreading of the case law.

First, the District Court's decision in this case is not – as Plaintiffs contend – contrary to this Court's recent decision in *Goldfarb v. Mayor of Baltimore*, 791 F.3d 500 (4th Cir. 2015). Not only was *Goldfarb* a Resource Conservation and

Recovery Act ("RCRA") case,[12] rather than a CWA case, it involved allegations of prior pollution being concentrated, exacerbated, and caused to migrate by ***ongoing*** construction activities. *Id*. at 505. In other words, there can be no question that the discharge in *Goldfarb* – which was caused by the active construction activities – was ongoing as a consequence of actions that were still occurring. Indeed, the plaintiffs in that case alleged the defendants' "construction activities would continue to contribute to and exacerbate existing contamination in the soil and groundwater, as well as its migration to [neighboring properties]." *Id*.

Such is not the case here. As the District Court noted, "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 pollutants to navigable waters." (App. 419, District Ct. Op.) Further, PPL's "placement of recovery wells and remediation efforts undertaken under the oversight of the SCDHEC is not a discernable, confined, or discrete conveyance of pollutants to navigable waters subject to NPDES permitting requirements." (App. 420, District Ct. Op.) Plaintiffs did not (and cannot) allege PPL is engaged in any ongoing actions that are causing the migration of any pollutant. To the contrary,

[12] It should be noted that Plaintiffs simultaneously rely on RCRA cases, while ignoring a case involving the Oil and Pollution Act of 1990 (the "OPA"), even though Congress and the courts have recognized that: (1) the OPA and the CWA both use the terms "discharge" and "navigable water" in the same way; and (2) those terms are intended to be interpreted identically. *See Rice v. Harken Exploration Co.*, 250 F.3d 264, 267 (5th Cir. 2001).

PPL has undertaken extensive remedial measures engineered to eliminate existing petroleum impacts to Browns Creek and the groundwater and to prevent additional petroleum constituents in the groundwater at the site from impacting Browns and Cupboard Creeks.[13] (*See supra* Statement of the Case at 8-10; *see generally* DEHC Website).

Second, Plaintiffs cite to a number of dredge and fill cases to support their claim that, even though the Pipeline has been repaired, PPL remains in violation of the CWA "as long as the pollution discharged from the point source continues to flow into the waterway." (App. Br. at 11; *see id*. at 16-17.) Other courts, however,

[13] Plaintiffs contend that PPL has reported "two large unpermitted streams of contaminated water: one 30 foot by 12 seep and one 12 foot by 12 foot seep" that are conveying contaminants to surface water at the site. (*See* App. Br. at 3.) Plaintiffs' use of the word "streams" is a gross mischaracterization of actual site conditions that are reported and described in PPL's reports and by DHEC. What PPL reported to DHEC was the presence of intermittent groundwater seeps in or near the banks of Browns Creek. As Plaintiffs are aware – by virtue of their own inspections of the site and Browns Creek and a plethora of publically available information – there are not, and have never been, any "streams" of contaminated water into Browns Creek. Plaintiffs are similarly aware that the actual impact to Browns Creek is limited to areas already being remediated by PPL and that the contaminants have not migrated downstream. On February 28, 2017 – at Plaintiffs' request – DHEC sampled surface waters at and downstream of Browns Creek. The results from that sampling event "did not detect petroleum contaminants above risk-based screening levels downstream from the release" and that impacts are limited to "three locations in Brown's [sic] Creek." DHEC further noted these three locations "are included in [PPL's] routine sampling as part of the ongoing site assessment and cleanup; the results from this sampling event are consistent with data from prior sampling events" and the "contaminants found at these locations are expected to decrease over time with the operation of the biosparging and aeration system." (*See* DHEC Website (follow "Surface Water Sampling Event" hyperlink)).

have recognized that dredge and fill cases are inherently different from cases involving the discharge of petroleum products, especially when it comes to determining whether a CWA violation is "ongoing" under *Gwaltney*. *See City of Mountain Park, Ga. v. Lakeside at Ansley, LLC*, 560 F. Supp. 2d 1288, 1296 (N.D. Ga. 2008) (distinguishing *N.C. Wildlife Fed'n v. Woodbury*, No. 87-584-Civ-5, 1989 WL 106517 (E.D.N.C. 1989) – a dredge and fill case – from cases involving "discharges of a leachate plume or petroleum products" (internal citations omitted)).[14] As one court noted:

> The majority of cases dealing with fill materials appear to adopt the approach taken in *Woodbury* of deeming the pollution "ongoing" as long as the polluting fill material remains in the water. In contrast, most of the decisions taking the stricter interpretation of "wholly past" violations employed in *Remington* have involved pollutants other than fill materials.

Id. (internal citations omitted). This is a logical distinction because, in dredge and fill cases, courts have found that it is not the act of dredging and filling that determines whether defendants are in violation of the CWA, but the act of purposefully retaining pollutants on defendants' property without taking remedial measures. *See, e.g.*, *Woodbury*, 1989 WL 106517, at *2 ("Treating the failure to take remedial measures as a continuing violation is eminently reasonable."); *see also Gache v. Town of Harrison, N.Y.*, 813 F. Supp. 1037, 1042 (S.D.N.Y. 1993)

[14] Significantly, *Woodbury* is the primary dredge and fill case that Plaintiffs cite in support of their position here.

("[T]he disposal of wastes can constitute a continuing violation as long as no proper disposal procedures are put into effect. . . ."). Here, indisputably, PPL is actively remediating the release. In other words, the cases on which Plaintiffs rely are distinguishable because those cases involve parties intentionally dumping contaminated fill onto a property and not taking remedial actions, as opposed to a party, with a one-time accidental release from a Pipeline, actively engaged in remediation under the supervision of a state agency charged with enforcing the CWA.

The majority of the dredge and fill cases on which Plaintiffs rely are also distinguishable for another, more fundamental reason – they are governmental enforcement actions.[15] (*See* App. Br. at 16-17.) This is a significant distinction because, unlike citizen suits, "[enforcement] actions by the government ***can*** be based on wholly past violations." *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 890 F.2d 690, 696 (4th Cir. 1989) (emphasis added); *see also*

[15] *See, e.g.*, *United States v. Reaves*, 923 F. Supp. 1530, 1534 (M.D. Fla. 1996) ("[T]he Government contends that Defendant's unlawful actions constitute a continuing violation of the CWA, as long as the illegal fill remains in place."); *Sasser v. EPA*, 990 F.2d 127, 128 (4th Cir. 1993) ("Sasser seeks to set aside a final order of the Administrator of the [EPA] assessing Class II penalties for reimpounding freshwater tidal wetlands without a permit."); *United States v. Cumberland Farms of Conn., Inc.*, 647 F. Supp. 1166, 1183 (D. Mass. 1986), *aff'd*, 826 F.2d 1151 (1st Cir. 1987) (involving a governmental suit against a farming corporation for violations of the CWA); *United States v. Tull*, 615 F. Supp. 610, 612 (E.D. Va. 1983), *rev'd on other grounds*, 481 U.S. 412 (1987) ("The government asserts that in filling of the wetlands without a permit the defendant has violated the requirements of the [CWA].").

Miss. R. Revival, Inc. v. City of Minneapolis, 145 F. Supp. 2d 1062, 1067 (D. Minn. 2001) ("The government remains free to seek civil penalties for all past CWA violations even if a CWA citizen suit is dismissed as moot."). The mere fact that the government has enforced the CWA with respect to dredge and fill cases after the dredging and filling has ceased in no way supports Plaintiffs' claim they can bring a citizen suit related to a discharge that occurred in the past.

Plaintiffs' reliance on *Marrero Hernandez v. Esso Standard Oil Co. (Puerto Rico)*, 597 F. Supp. 2d 272 (D.P.R. 2009), is similarly misplaced. The plaintiffs in *Marrero Hernandez* filed suit in connection with gasoline leaks emanating from underground storage tanks at a gas station. *See id*. at 267-77. The court – basing its decision on Justice Scalia's concurring opinion in *Gwaltney*, rather than the majority opinion – stated that "'[w]hen a company has violated an effluent standard or limitation, it remains for purposes of [§ 1365(a)] "in violation" of that standard or limitation so long as it has not put in place remedial measures that clearly eliminate the cause of the violation.'" *Id*. at 286 (quoting *Gwaltney*, 484 U.S. at 69 (Scalia, J., concurring)). Even assuming that this was the law (which it is not), it is undisputed PPL has already eliminated "the cause of the violation" by repairing the Pipeline. Moreover, PPL is actively engaged in remedial measures to address the effects of the prior release.

The central truth – from which Plaintiffs cannot escape – is that their Complaint alleges only one wholly past ***discharge*** from a point source. Both before and after *Gwaltney*, courts across the country have held that the "migration of residual contamination from previous releases does not constitute an ongoing discharge." *Wilson v. Amoco Corp.*, 33 F. Supp. 2d 969, 975 (D. Wyo. 1998); *see also Aiello v. Town of Brookhaven*, 136 F. Supp. 2d 81, 120-21 (E.D.N.Y. 2001) (dismissing a CWA citizen suit against a past polluter "for the ongoing migrating leachate plume"); *Crigler*, 2010 WL 2696506, at *5; *Friends of Santa Fe Cty. v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1354 (D.N.M. 1995) ("Migration of residual contamination resulting from previous releases is not an ongoing discharge within the meaning of the [CWA]."). The same is true here. Holding otherwise "would undermine the CWA's limitations as set forth in the statute's definition of point source and the Supreme Court's holding in *Gwaltney*." *Wilson*, 33 F. Supp. 2d at 121.

B. Plaintiffs Do Not Allege Any Facts Evidencing a Discharge of a Pollutant from a Point Source into Any Navigable Waters.

Contrary to Plaintiffs' assertions, the District Court did not determine that the CWA requires that a "point source discharge directly into a waterway." (App. Br. at 18.) Instead, the District Court correctly concluded that Plaintiffs did not "allege any facts to support the position that the pipeline discharged petroleum

directly into navigable waters." (App. 416, District Ct. Op.)[16] As the District Court noted, "the pipeline leaked petroleum into the ground and the contaminants are migrating through the soil and groundwater at the [site]." (App. 417, District Ct. Op.) Yet, Plaintiffs ask that their Complaint be interpreted - - notwithstanding their allegations - - to contend that a discharge into a navigable water via an indirect movement of pollutants towards those waters (*i.e*, groundwater) from a past spill is actionable under the CWA. (App. Br. at 18.)

This precise issue was addressed in *Tri-Realty Co. v. Ursinus College*, No. 11-5885, 2013 WL 6164092 (E.D. Pa. Nov. 21, 2013).[17] There, the plaintiff alleged that heating oil had leaked from the defendant's underground storage tanks and migrated through the subsurface soil, where it contaminated the plaintiff's land and water. No. 11-5885, 2013 WL 6164092, at *1 (E.D. Pa. Nov. 21, 2013). The court concluded:

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[16] Plaintiffs fault the District Court for addressing whether PPL was ***directly*** discharging pollutants into navigable waters, (App. Br. at 17-18), when that language came ***directly*** from their Complaint. (*See* App. 21-22, Compl., ¶ 62 (alleging that Appellees "are discharging contaminated pollutants directly . . . into Browns Creek, adjacent wetlands, and other downstream waters"). The District Court simply used the term "directly" to distinguish between allegations in the Complaint of a discharge to soil and groundwater, which are not subject to the CWA, and discharges from a point source which reach a navigable water via a discrete conveyance and, thus, are subject to the CWA. (*See* App. 416-17, 419 District Ct. Op.)

[17] Plaintiffs wrongly represent that *Tri-Realty Co.* is an "unreported decision." (*See* App. Br. at 25.) Though only a Westlaw citation is available for that decision, it is still a reported decision. When a case is unpublished or unreported, Westlaw generally indicates that the case has been designated as unpublished or unreported.

> Tri-Realty can only plausibly allege a discharge of oil directly into the soil (that is, dry land) or—more speculatively, but nonetheless plausibly—into groundwater that is in direct contact with the underground tanks. The fact that this oil may then have migrated through the soil and groundwater . . . to flow into the allegedly "navigable waters" of Bum Hollow Run, does not necessarily transform the original release of oil into a discharge of a pollutant into navigable waters for the purposes of federal regulation, unless the Court concludes that groundwaters *themselves* are navigable waters subject to CWA and OPA regulations, or (for the purposes of CWA, but *not* the OPA), that Tri-Realty has adequately alleged that pollutants have reached Bun Hollow Run or the Perkiomen Creek through an intermediate "point source."

Id. at *6 (emphasis in original). After considering the plaintiff's arguments, the court found that "the tanks are the only 'point source' from which the oil was discharged directly by Ursinus." *Id*. at *7. It reached that decision because "[a] discharge of pollutants into navigable waters occurring only through migration of groundwater and uncontrolled soil runoff represents 'nonpoint source' pollution." *Id*. There is no difference here.

By Plaintiffs' own admission, the Pipeline released product into the soil and groundwater, and that product then migrated through the soil and groundwater toward Browns Creek and Cupboard Creek. (*See* App. 7-8, Compl., ¶¶ 10, 16.) As in *Tri-Realty Co.*, the only plausible discharge of product that Plaintiffs have alleged is directly into the soil and/or the groundwater under the site. That this product "may then have migrated through the soil and groundwater" into Browns Creek does not transform the original release of product into a discharge of a

pollutant into navigable waters for purposes of the CWA. *Tri-Realty Co.*, 2013 WL 6164092, at *1.

II. ANY ONGOING "DISCHARGE" PLAINTIFFS SEEK TO REDRESS IS NOT ACTIONABLE UNDER THE CWA BECAUSE IT DOES NOT EMANATE FROM A POINT SOURCE.

Before the District Court, Plaintiffs, perhaps in tacit recognition that they have no cognizable claim with respect to the November 2014 Release, repackaged their claim by arguing that areas of soil and groundwater contaminated from the release were themselves "point sources." (*See, e.g.*, App. 21-22, Compl., ¶ 62 ("[T]he area soaked with and contaminated by Defendants' leaked gasoline and petroleum products . . . and the seeps, flows, fissures, and channels are point sources that continue to discharge pollution into surface water and wetlands in violation of the Clean Water Act.").) In their Opening Brief, however, they have abandoned those arguments by failing to address them. *See United States v. Al-Hamdi*, 356 F.3d 564, 571 n.8 (4th Cir. 2004) ("It is a well settled rule that contentions not raised in the argument section of the opening brief are abandoned."). Nevertheless, this Court ***should*** address those issues and should uphold the District Court's determination that neither the "Spill Area"[18] nor the contaminated groundwater are, themselves, point sources.

[18] The Plaintiffs define the "Spill Area" or "Spill Site" as "…the area soaked with and contaminated by [PPL's] leaked gasoline and petroleum products…" (App. 19, Compl., ¶ 56.)

The "discharges" alleged by Plaintiffs squarely fall within the definition of nonpoint source pollution. This is so because "[d]ischarge from migrations of groundwater or soil runoff is not point source pollution." *Chesapeake Bay Found., Inc. v. Severstal Sparrows Point, LLC*, 794 F. Supp. 2d 602, 619-20 (D. Md. 2011); *see also PennEnvironment v. PPG Indus., Inc.*, 964 F. Supp. 2d 429, 454-55 (W.D. Pa. 2013) (stating the same); *Sierra Club v. El Paso Gold Mines*, 421 F.3d 1133, 1141 n.4 (10th Cir. 2005) ("Groundwater seepage that travels through fractured rock would be nonpoint source pollution, which is not subject to NPDES permitting."); *Potter v. Asarco Inc.*, No. 8:96CV555, 1999 WL 33537055, at *2 (D. Neb. Apr. 23, 1999) (finding that groundwater discharges are not discharges from a point source and thus not within the scope of the CWA); *Friends of Santa Fe Cty. v. LAC Minerals*, 892 F. Supp. 1333, 1359 (D.N.M. 1995) (holding that seepage of pollutants through soil into groundwater was not a point source, and thus not subject to NPDES permitting requirements). Rather it is "nonpoint source pollution," and "[t]here is no basis for a citizen suit for nonpoint source discharges under the CWA." *Chesapeake Bay Found., Inc.*, 794 F. Supp. 2d at 620.

The Fifth Circuit Court of Appeals' decision in *Hamker* specifically addressed this issue in an analogous context:

> [E]ven liberally construed, the complaint alleges only a single past discharge with continuing effects, not a continuing discharge. However, even if the complaint is construed to allege a continuing seepage into groundwater of the now-dispersed leaked oil, we cannot

> say this amounts to a continuing violation of section 1311 because that section prohibits only "discharges of any pollutant," which in turn are defined in section 1362(12) to be "any addition of any pollutant to navigable waters, *from* any *point source*." A "point source" is a "discernible, confined and discrete conveyance, including but not limited to any pipe…." No continuing addition to the ground water from a point source is alleged, nor could it be alleged under the facts set forth in this complaint. Rather, the complaint alleges, necessarily, only that there are continuing *effects* from the past discharge, and such an allegation is insufficient for purposes of section 1365.

Id. at 397 (internal citations omitted, emphasis original).

No petroleum has been released from the Pipeline to the site since its repair. Tellingly, the Complaint alleges only that the product released in 2014 "is making its way into groundwater supplies, wetlands, and surface waters in Anderson County and the Savannah River watershed." (App. 7-8, Compl., ¶ 10.) Yet, even when construing the Complaint in this way – as alleging a continuing seepage of the now-dispersed leaked product into the groundwater and the surface water – those allegations fail to state an actionable CWA claim because they do not involve a discharge from a ***point source***. At most, Plaintiffs' Complaint alleges that there are continuing ***effects*** from the past release. Holding that migration of residual contamination from a previous release constitutes an ongoing discharge "would undermine the CWA's limitations as set forth in the statute's definition of point source and the Supreme Court's holding in *Gwaltney*." *Wilson*, 33 F. Supp. 2d at 975.

Plaintiffs incorrectly argue that the Spill Area and contaminated groundwater qualify as point sources because a point source "'need only convey the pollutant to "navigable waters."'" (App. 18-19, Compl., ¶ 52 (quoting *S. Fla. Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004))) The CWA, however, is clear that a point source must **also** be a "discernable, confined, and discrete conveyance," (*i.e.*, a "pipe, ditch, channel, tunnel, conduit, well, [etc.]"). 33 U.S.C. § 1362(14). In this context, the cases on which Plaintiffs rely for this proposition have no bearing on the issues at hand because they deal with the question of whether a party discharging pollutants through "discrete conveyance" can be held liable under the CWA even if it was not the original source of the pollutant. *See, e.g.*, *S. Fla. Water Mgmt. Dist.*, 541 U.S. at 105 (holding that a state water management agency's pumping of already polluted water into a navigable water is actionable under the CWA); *W. Va. Highlands Conservancy, Inc. v. Huffman*, 625 F.3d 159, 168 (4th Cir. 2010) (finding that the West Virginia Department of Environmental Protection needed a NPDES permit for discharges from abandoned coal mining sites it had reclaimed, noting that the DEP acknowledged that the outfalls in question had the characteristics of a point source, and that the CWA does not include a "causation requirement"); *United States v. Earth Scis., Inc.*, 599 F.2d 368, 374 (10th Cir. 1979) (holding that unintentional overflows from a mining operation's machinery were regulated by

the CWA); *O'Leary v. Moyer's Landfill, Inc.*, 523 F. Supp. 642, 655 (E.D. Pa. 1981) (finding that leachate from a landfill was regulated by the CWA even though the landfill owner did not intend for the leachate to escape). Contrary to the allegations of the Complaint, the fact that the Spill Area and the contaminated groundwater may convey product to navigable water does not render them point sources because they are not "discernable, confined, and discrete conveyance[s]." 33 U.S.C. § 1362(14).

Simply stated, Plaintiffs cannot transform what is a wholly past discharge into an ongoing violation of the CWA by characterizing the soil and the groundwater as point sources when clear precedent states that they are non-point sources and thus not governed by the CWA.

III. THE CWA DOES NOT REGULATE DISCHARGES INTO GROUNDWATER, EVEN IF IT IS "HYDROLOGICALLY CONNECTED" TO SURFACE WATERS.

Plaintiffs concede the CWA does not regulate discharges into groundwater.[19] (*See* App. Br. at 31 ("[T]he definition of 'navigable waters' does not include groundwater.")). Yet, they challenge the District Court's holding that the CWA

[19] Established law supports this concession. *See, e.g., Chevron U.S.A. Inc. v. Apex Oil Co., Inc.*, 113 F. Supp. 3d 807, 817 (D. Md. 2015) ("As several courts have observed, in other provisions of the CWA, Congress refers to 'navigable waters' and 'ground waters' as separate concepts, thus indicating that Congress considered them to be distinct."); *see also* 33 U.S.C. § 1252(a) (referring to "navigable waters ***and*** ground waters" (emphasis added)); 33 U.S.C. § 1254(a)(5) (referring to the same); 33 U.S.C. § 1256(e)(1) (referring to the same).

does not regulate discharges into groundwater that is hydrologically connected to surface water. (App. Br. at 26-27.) Said differently, while Plaintiffs admit that the CWA does not regulate discharges into groundwater, they create another class of water that they contend CWA does regulate, *i.e.*, groundwater with an alleged "hydrological connection" to surface waters. In Plaintiffs' view, groundwater is no longer "groundwater" if there may be a hydrological connection to surface waters.

As an initial matter, the Court need not reach this issue if it concludes – as it should, and as the District Court did – that the only discharge actionable under the CWA in this case (*i.e.*, from the Pipeline to the soil/groundwater) is wholly past and, thus, is not an appropriate basis for a citizen suit. In other words, it does not matter whether discharges to groundwater that is hydrologically connected to navigable waters are actionable under the CWA where, as is the case here, that discharge is "wholly past." Should the Court reach this issue, however, it is evident that the District Court's decision was correct.

A. Every Circuit Court That Has Confronted the Hydrological Connection Issue Has Rejected the Arguments Plaintiffs Make Here.

This Court has not considered whether the CWA encompasses groundwater that is hydrologically connected to surface waters. (App. 422, District Ct. Op.) Yet, as the District Court noted, ***both*** of the circuit courts that have addressed this

issue "have concluded that navigable waters does not include groundwater that is hydrologically connected to surface waters."[20] (*Id*.)

In *Rice v. Harken Exploration Co.*, the Fifth Circuit confronted the question of whether the Oil Pollution Act of 1990 authorized citizen suits related to the discharge of petroleum products into groundwater that is hydrologically connected to surface waters.[21] 250 F.3d 264 (5th Cir. 2001). The defendant in *Rice* was engaged in the exploration, pumping, processing, transporting, and drilling of oil. *Id*. at 265. The plaintiffs alleged that the defendant had discharged, and continued to discharge, pollutants into several nearby creeks and other "independent ground and surface waters." *Id*. The Court of Appeals first noted that groundwater is not "within the class of waters protected by the CWA." *Id*. at 269. It then proceeded to address the plaintiffs' argument that "discharges have seeped through the ground into groundwater which has, in turn, contaminated several bodies of surface

[20] A third court of appeals also addressed this issue and held that the CWA does not apply to groundwater. *United States v. Johnson*, 347 F.3d 157, 161 n.4 (1st Cir. 2006). That decision, however, was subsequently withdrawn, vacated, and remanded on other grounds. *See United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006).

[21] The "discharge" and "navigable water" analysis under the OPA is identical to that used in CWA cases. *See Rice*, 250 F.3d at 267 ("The legislative history of the OPA and the textually identical definitions of 'navigable waters' in the OPA and the CWA strongly indicate that Congress generally intended the term 'navigable waters' to have the same meaning in both the OPA and the CWA. Accordingly, the existing case law interpreting the CWA is a significant aid in our present task of interpreting the OPA.").

water." *Id*. at 270. In other words, the plaintiffs in *Rice* argued – as Plaintiffs argue here – that discharges into hydrologically connected groundwater can support a citizen suit.[22] The Court of Appeals disagreed, holding that such discharges are not actionable:

> So far as here relevant, the "discharges" for which the OPA imposes liability are those "into or upon the navigable waters." As noted, "navigable waters" do not include groundwater. It would be an unwarranted expansion of the OPA to conclude that a discharge onto dry land, some of which eventually reaches groundwater and some of the latter of which still later may reach navigable waters, all by gradual, natural seepage, is the equivalent of a "discharge" "into or upon the navigable waters."

Id. at 271.

Similarly, the Seventh Circuit, in *Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir. 1994), found that discharges into groundwater are not regulated by the CWA, ***even if*** that groundwater is hydrologically connected with surface waters. The plaintiff in that case sought to stop the construction of a warehouse that included a plan to collect rainwater runoff in a six-acre artificial pond that would retain petroleum products and other pollutants while "exfiltrating" the water to the ground below. *Id*. at 964. The Court of Appeals' holding could not have been clearer: "***Neither the Clean Water Act nor***

[22] Plaintiffs discount the Fifth Circuit's decision in *Rice* because they "do not contest" that groundwater is not *per se* a water of the United States. (App. Br. at 33.) Yet they fail to acknowledge that the *Rice* court also adjudicated the question of discharges into hydrologically connected groundwater, which is the precise question they ask this Court to decide.

the EPA's definition asserts authority over ground waters, just because these may be hydrologically connected with surface waters." *Id*. at 965 (emphasis added).

Plaintiffs largely ignore the Seventh Circuit's holding in *Vill. of Oconomowoc Lake*, claiming that it is "irrelevant" because it "do[es] not address the issue of discharges of pollutants to admittedly jurisdictional surface waters through directly-connected groundwater." (App. Br. at 33.) That claim, however, cannot be squared with the Seventh Circuit's plain statement that the CWA does not assert authority over groundwater that is hydrologically connected to surface waters. *See Vill. of Oconomowoc Lake*, 24. F.3d at 965. Instead, Plaintiffs argue that another Seventh Circuit opinion, *U.S. Steel Corp. v. Train*, 556 F.2d 822 (7th Cir. 1977), supports their argument.[23] That case, however, does not involve a citizen suit. Nor did that decision address whether discharges into hydrologically connected groundwater are actionable under the CWA. Rather, *U.S. Steel Corp.* merely stands for the proposition that the EPA has the authority to control disposals into deep wells when it is already administering a NPDES permit program concerning surface discharges. *Id*. at 852. In contrast, *Vill. of Oconomowoc Lake* ***did*** involve a citizen suit, and the court in that case expressly

[23] The Seventh Circuit has since abandoned its decision in *U.S. Steel Corp.* on other grounds. *See City of W. Chicago, Ill. v. U.S. Nuclear Regulatory Comm'n*, 701 F.2d 632, 644 (7th Cir. 1983).

held that the CWA does not confer jurisdiction over discharges into groundwater that is hydrologically connected to surface waters. *Vill. of Oconomowoc Lake*, 24 F.3d at 965.

Plaintiffs' reliance on the Tenth Circuit's decision in *Quivira Mining Co. v. EPA*, 765 F.2d 126 (10th Cir. 1985), is similarly misplaced. That case also did not involve a citizen suit. Nor did it address whether discharges into groundwater which may be hydrologically connected to surface waters are actionable under the CWA. The issue in *Quivira Mining Co.* was whether two transitory streams qualified as "waters of the United States" for purposes of the CWA. *See id*. at 128-29. The Tenth Circuit found that, though Arroyo del Puerto and San Mateo Creek are not "navigable-in-fact," they still qualify as "waters of the United States" because "during times of intense rainfall, there can be a surface connection between the Arroyo del Puerto, San Mateo Creek and navigable-in-fact streams," and because, when the waterways are dry on the surface, "the flow continues regularly through underground aquifers fed by the surface flow . . . into navigable-in-fact streams." *Id*. at 130. Here, unlike *Quivira Mining Co.*, there are no surface waters - - transitory or not - - through which pollutants are conveyed to navigable waters, nor any allegation of such transitory surface stream conveyances. Thus, the Tenth Circuit's decision in *Quivira Mining Co.* has no bearing on the issues now before this Court.

B. The Most Persuasive District Court Decisions Have Similarly Held That the CWA Does Not Confer Jurisdiction Over Hydrologically Connected Groundwater.

While the circuit courts that have addressed this issue to date have unanimously rejected Plaintiffs' "hydrological connection" argument, lower courts – including those in the Fourth Circuit – have split on the question of whether the CWA encompasses groundwater that is hydrologically connected to surface waters. (App. 422-424, District Ct. Op.) Plaintiffs predictably focus on those cases in which courts have broadly read the CWA as applying to discharges into hydrologically connected groundwater. Yet, that is only half of the story. As the District Court properly concluded below, "a narrower interpretation of 'navigable waters' is more persuasive." (App. 424, District Ct. Op.)

Plaintiffs cite to several cases which have found that discharges from a point source to groundwater that is hydrologically connected to surface waters are actionable under the CWA. *See, e.g.*, *Sierra Club v. Va. Elec. And Power Co.*, No. 2:15-CV-112, 2017 WL 1095039 (E.D. Va. Mar. 23, 2017); *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). Those cases, however, all deal with coal ash storage areas alleged to be continuously leaching contaminants into groundwater that migrates

into adjacent surface waters.[24] This is a factually distinct scenario from the one at issue here. Specifically, the coal ash storage areas in the cases cited by Plaintiffs are alleged to be ***point sources that continue to discharge pollutants*** while the Pipeline at issue here ***has not discharged any pollutants for nearly three years***. Thus, regardless of the merits of such an interpretation, the factual differences between those cases and this render them without value.

Moreover, the courts that have held that groundwater is not regulated by the CWA or the OPA, even if it is hydrologically connected to surface waters (including those in this circuit), have engaged in a more sure-footed reading of both Congressional intent and the Supreme Court's case law. *See, e.g.*, *Chevron U.S.A. Inc. v. Apex Oil Co., Inc.*, 113 F. Supp. 3d 807, 816-17 (D. Md. 2015) ("Congress did not intend for groundwater to fall within the purview of 'navigable water,' even if it is hydrologically connected to a body of 'navigable water.'"); *Cape Fear River Watch, Inc.*, 25 F. Supp. 3d at 810 ("Congress did not intend for the CWA to extend federal regulatory authority over groundwater, regardless of whether that groundwater is eventually . . . 'hydrologically connected' to navigable surface waters"); *Tri-Realty Co.*, 2013 WL 6164092, at *9 (stating the same);

[24] The same is true for the coal ash pond that is the subject of the recently concluded trial in the Middle District of Tennessee. *See Tenn. Clean Water Network v. Tenn. Valley Auth.*, No. 3:15-CV-00424, 2017 WL 3476069 (M.D. Tenn. Aug. 4, 2016).

Umatilla Waterquality Prot. Ass'n v. Smith Frozen Foods, Inc., 962 F. Supp. 1312, 1320 (D. Ore. 1997) (stating the same). These decisions have been based on a thorough analysis of the language and legislative history of the CWA, many other courts' examinations of the issue, and the impact of the Supreme Court's ruling in *Rapanos v. United States*, 547 U.S. 715 (2006). *See, e.g.*, *Cape Fear River Watch, Inc.*, 25 F. Supp. 3d at 809-10; *Tri-Realty Co.*, 2013 WL 6164092, at *9 n.7.

In *Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc.*, the district court 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." 25 F. Supp. 3d at 810. The court in that case based its decision on the Justice Scalia's opinion in *United States v. Rapanos*. *Id*. Indeed, it reasoned that:

> The plurality holding in *Rapanos* repeatedly admonishes the lower courts and the Corps for attempting to expand the definition of navigable waters to encompass virtually all water, regardless of its actual navigability, location, or consistency of flow. The Supreme Court also reiterates that, in *Riverside Bayview*, it held that the phrase "waters of the United States" "referred primarily to 'rivers, streams, and other hydrographic features more conventionally identifiable as waters' than the wetlands adjacent to such features." "Likewise, in both *Riverside Bayview* and *SWANCC*, [the Supreme Court] repeatedly described the 'navigable waters' covered by the [CWA] as 'open water' and 'open waters.'"
>
> . . . .In *Rapanos*, the Court does not endorse a broad interpretation of the term navigable waters, and sets forth tests that will exclude some wetlands from the scope of the CWA. Thus, this court is satisfied that groundwater (which is even less fairly described as "open water" or a

> conventionally understood hydrographic or geographic "feature" than any wetland) does not fall within the meaning of the statute.

Id. at 809-10 (internal citations omitted).

Another district court in the Fourth Circuit – in *Chevron U.S.A., Inc. v. Apex Oil Co., Inc.* – provided a detailed explanation as to why it found "the narrower interpretation" of the term "navigable water" – which excludes groundwater – more persuasive:

> First, such a reading finds more support in statutory language of the CWA. As several courts have observed, in other provisions of the CWA, Congress refers to "navigable waters" and "ground waters" as separate concepts, thus indicating that Congress considered them to be distinct. Second, the legislative history of the CWA indicates that Congress chose not to regulate groundwater, in part because "the jurisdiction regarding groundwaters is so complex and varied from State to State."
>
> Finally, this narrower interpretation of "navigable waters" is supported by the Supreme Court's ruling in *Rapanos v. United States*, [547 U.S. 715 (2006)]. There, the Court considered what standard to apply in order to determine if certain *wetlands* constitute "navigable waters" under the CWA. In setting forth tests that excluded some wetlands from the scope of the CWA, the Supreme Court eschewed a broad interpretation of "navigable waters" and repeatedly cautioned against "attempting to expand the definition of navigable waters to encompass virtually all water, regardless of its actual navigability, location, or consistency of flow."

113 F. Supp. 3d at 817 (internal citations omitted).[25]

[25] Plaintiffs also argue that dismissal was inappropriate because the District Court should have conducted a factual inquiry into the extent, if any, of the hydrological connection between the Spill Area and Browns Creek. (*See* App. Br. at 36.) Such an inquiry is unnecessary and immaterial if this Court concludes that groundwater is not subject to the CWA even if it is hydrologically connected to a navigable water.

Although Plaintiffs suggest that these cases are outliers, these cases faithfully follow the Supreme Court's clear direction, which was recently reiterated in an order of the Executive Branch issued by the President of the United States. Executive Order 13,778 issued on February 28, 2017, which directs the EPA "shall consider interpreting the term "navigable waters," as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006)." Exec. Order No. 13,778, 82 Fed. Reg. 41 (Feb. 28, 2017).

C. Applying the CWA to Discharges into Groundwater That Is Hydrologically Connected to Surface Waters Would Be Unworkable.

Accepting Plaintiffs' interpretation of CWA jurisdiction would necessitate requiring a NPDES permit whenever a pollutant is discharged into hydrologically connected groundwater (*i.e.*, any groundwater) without regard to when and how far in the past the spill occurred and would create an unprecedented expansion of the EPA's regulatory jurisdiction. Such an interpretation would transform the NPDES permitting system into a federal vehicle through which the authority of state regulatory agencies could be usurped by citizen groups whenever any spill occurred.

Remediation of groundwater is already regulated by multiple state and federal laws enforcement regimes. For example, the following provide authority

for state and federal environmental enforcement agencies to require groundwater remediation:

- The Resource Conservation and Recovery Act of 1976. *See* 42 U.S.C. §§ 6901, *et seq.*;
- The Comprehensive Environmental Response, Compensation, and Liability Act. *See* 42 U.S.C. §§ 9601, *et seq.*;
- The many and varied State groundwater protection statutes and regulatory regimes.[26]

Finding that the CWA also applies to discharges into groundwater that is alleged to be hydrologically connected to surface water (*i.e.*, ***all*** groundwater) would interfere with many of these laws and regulations and subject parties like PPL to overlapping, and even contradictory, discharging, operating, monitoring, reporting, and permitting requirements. It would also ignore the legislative history of the CWA, which indicates that Congress chose not to regulate groundwater, in part, because "the jurisdiction regarding groundwaters is so complex and varied from State to State." S. Rep. No. 92-414 (1972), *as reprinted in* 1972 U.S.C.C.A.N. 3668, 3739.

Since the CWA was enacted in 1972, the EPA has not required NPDES permits for, *inter alia*, underground injection control ("UIC") wells, cesspools,

[26] Moreover, and as discussed extensively above and in Defendants' arguments to the District Court in support of abstention, the petroleum release to the soil and groundwater at the site is being remediated pursuant to South Carolina law and under the direction and oversight of DHEC. (*See* DHEC Website (follow "Response and Assessment Actions" hyperlink); *see also* App. 71-80, Mot. to Dismiss Br.)

underground storage tanks, and septic systems.[27] Yet, under Plaintiffs' interpretation, anyone that operates or owns any of these would be required to obtain an NPDES permit because every one of those systems has the potential to leak or is directly discharging into groundwater that can be alleged to be hydrologically connected to surface water. There are millions of individuals and businesses in this country that use UIC wells, cesspools, underground storage tanks, and septic systems which are legally operating pursuant to the various programs.[28] If this Court accepts the argument the CWA applies to discharges into allegedly hydrologically connected groundwater, every one of those millions of people and businesses will be required to apply to the EPA or an authorized state for a NPDES permit, ***just in case*** there is an accidental leak or discharge or ***just in case*** an already authorized discharge may be to groundwater which may be hydrologically connected to surface water.

The impact that this reading would have is profound, as exemplified by even a cursory analysis of its effects on residents of South Carolina's low country. Thousands of low country residents have septic systems for their residential homes and thousands of these systems were installed directly adjacent to lakes, rivers,

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[27] EPA's website states: "Individual homes that are connected to a municipal system, use a septic system, or do not have a ***surface*** discharge do not need an NPDES permit…" (emphasis added). *See* https://www.epa.gov/laws-regulations/summary-clean-water-act (last visited August 25, 2017).

[28] *See, e.g.*, S.C. Code Ann. Regs. 61-56.

streams, creeks, bays and even the ocean, leaving little doubt these systems are or could impact surface waters. Sewage is expressly included in the definition of "pollution" and a septic tank is a "point source." However, EPA has never applied the CWA's NPDES program to these systems. Many of those residents do not have the financial means or ability to even get a NPDES permit from the EPA. Yet, their failure to do so could result in crippling financial sanctions, and even criminal penalties, if their septic system leaches into the surrounding groundwater that is hydrologically connected to navigable waters. Moreover, even if a fraction of the homeowners with septic systems applied to EPA or authorized state for NPDES permits, that new volume of permit applications, and the corresponding need for oversight, would overwhelm the agencies' existing staff and resources.

The Supreme Court previously addressed and rejected a similar attempt to interpret an existing pollution control statute – the Clean Air Act (the "CAA") – in a way that would drastically increase EPA's regulatory regime. The case of *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014), involved EPA's attempt – in 2007 – to increase the scope of the CAA's Prevention of Significant Deterioration ("PSD") provisions to apply to greenhouse-gas emissions. *Id.* at 2430-31. The Supreme Court rejected this interpretation of the CAA for reasons relevant to the present case:

> The fact that EPA's greenhouse-gas-inclusive interpretation of the PSD and Title V triggers would place plainly excessive demands on limited governmental resources is alone a good reason for rejecting it; but that is not the only reason. EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization. When an agency claims to discover in a long-extant statute an unheralded power to regulate "a significant portion of the American economy," we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.

Id. at 2444 (internal quotation marks and citations omitted). The Court's rational in *Util. Air Regulatory Grp.* applies equally here and similarly justifies rejecting Plaintiffs' overly broad and unsupported reading of the CWA.

Finally, using a mere allegation of "hydrological connection" to expand federal jurisdiction effectively obliterates any distinction between groundwater – which Congress explicitly did not intend the CWA to regulate – and navigable waters. Nearly all groundwater, unless it is extracted, ultimately flows to navigable water. In the most literal sense of the term, most groundwater is "hydrologically connected" to navigable waters. Plaintiffs propose no principled method that could distinguish between groundwaters that are or are not subject to CWA regulation. Rather, they propose a system in which the ingenuity of attorneys in alleging a "hydrological connection," no matter how tenuous it may be, changes the nature of groundwater into something that apparently is no longer groundwater and hence subject to CWA jurisdiction. This ingenuity would, at its

logical extent, make citizen groups the regulators of groundwater under the CWA and supplant the authority of state agencies that are charged with protection and regulation of groundwater.

CONCLUSION

For the reasons set forth herein, PPL respectfully requests that this Court affirm the District Court's dismissal of Plaintiffs' Complaint.

Respectfully submitted this the 1st day of September, 2017.

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Dated: September 1, 2017

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 1st day of September 2017, I caused this Brief of Appellees to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 1st day of September 2017, I caused the required copies of the Brief of Appellees to be hand filed with the Clerk of the Court.

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