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DIGGING DEEP: THE CLEAN WATER ACT'S APPLICABILITY TO GROUNDWATER DISCHARGES

Abstract: In its 2018 decision, *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, the United States Court of Appeals for the Fourth Circuit found liability under the Clean Water Act (“CWA”) for point source pollutant discharges that travel through hydrologically connected groundwater on their way to a navigable waterway. This decision aligned the court with precedent from the United States Courts of Appeals for the Second and Ninth Circuits, but later decisions from the United States Court of Appeals for the Sixth Circuit resulted in a clear circuit split on the issue of CWA applicability to discharges that travel through groundwater. The Fourth Circuit also split from several other circuits in its subsidiary finding that liability could be found where there is a continued migration of pollution despite the point source itself ceasing to pollute. This Comment argues that the Fourth Circuit’s decision adhered to the CWA’s intentionally broad purpose and will improve the ability of citizen groups and government entities to hold polluters accountable.

INTRODUCTION

The Clean Water Act (“CWA”) has achieved tremendous success in reducing water pollution and improving water quality.¹ Through its requirement that polluters obtain discharge permits and its comprehensive penalty regime for permit violators, the law has played a substantial role in the restoration and preservation of the nation’s waters.² Key to the CWA’s success in holding polluters accountable is its citizen-suit provision, which enables citizens or citizen groups to initiate legal action against parties alleged to be

¹ William L. Andreen, *Success and Backlash: The Remarkable (Continuing) Story of the Clean Water Act*, 4 GEO. WASH. J. ENERGY & ENVTL. L. 25, 26 (2013) (concluding that discharges from municipal and industrial polluters have significantly decreased and that water quality has seen improvement nationwide). Findings of improved water quality and decreased pollution are based on empirical studies put together for the Environmental Protection Agency (EPA). See EPA, PROGRESS IN WATER QUALITY: AN EVALUATION OF THE NATIONAL INVESTMENT IN MUNICIPAL WASTEWATER TREATMENT 2-72, at 4–10 (2000), <https://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=20009NCX.TXT> [<https://perma.cc/N2GU-GJ74>] (finding a significant decrease in discharges of harmful organic pollutants from municipal wastewater treatment plants, despite those treatment plants serving an increasing population).

² Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251–1387 (2012). See EPA, PROGRESS IN WATER QUALITY, *supra* note 1, at 4–10 (finding that the Clean Water Act resulted in a significant reduction in the discharge of contaminants and improvements in the overall water quality of the studied waterways); Andreen, *supra* note 1, at 29 (determining that the EPA study “presented unambiguous evidence that the [CWA]’s approach to point source regulation was environmentally effective”).

in violation of the law's requirements.³ The law and its citizen-suit provision have, however, sustained substantial challenges to their scope.⁴ Specifically, industry representatives have argued for a narrow interpretation of statutory violations and have sought to exclude groundwater discharges from the CWA's scope.⁵

This Comment explores the CWA's applicability to the unplanned discharge of petroleum from a pipeline through the soil and groundwater and into a navigable waterway in *Upstate Forever v. Kinder Morgan Energy Partners, L.P. (Upstate Forever II)*.⁶ On April 12, 2018, the United States Court of Appeals for the Fourth Circuit held that a pipeline does not need to continue to discharge pollutants for an ongoing CWA violation to be found.⁷ The Fourth Circuit's decision also aligned with the United States Courts of Appeals for the Second and Ninth Circuits in finding CWA applicability to

³ 33 U.S.C. § 1365; see Mark A. Ryan, *Clean Water Act Citizen Suits: What the Numbers Tell Us*, 32 NAT. RES. & ENV'T 20, 22 (2017) (noting the large quantity of citizen-initiated CWA suits and their frequent success); Kristi M. Smith, *Who's Suing Whom: A Comparison of Government and Citizen Suit Environmental Enforcement Actions Brought Under EPA-Administered Statutes, 1995–2000*, 29 COLUM. J. ENVTL. L. 359, 399 (2004) (determining that eighty-eight percent of all citizen-initiated environmental prosecutions were for CWA violations).

⁴ See *Rapanos v. United States*, 547 U.S. 715, 739 (2006) (involving a challenge to the CWA's definition of "navigable waters," in which a plurality found the CWA inapplicable to non-permanent water bodies); *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 171–72 (2001) (excluding isolated and seasonal ponds from the CWA's definition of "navigable waters"); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 58–59 (1987) (challenging the definition of "violation" in CWA citizen-suits and holding that citizens must allege an ongoing violation rather than a wholly past one); see also *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 187–88 (2000) (permitting citizen groups to seek civil penalties and achieve standing in CWA actions where the defendant ceases the violation-causing conduct after the complaint's filing).

⁵ See *Gwaltney*, 484 U.S. at 55 (summarizing arguments from industry representatives seeking to limit CWA application to point sources actively discharging at time complaint was filed); *Haw. Wildlife Fund v. County of Maui*, 886 F.3d 737, 744–46 (9th Cir. 2018) (summarizing the defendant's argument that the CWA should be limited to point sources that directly convey pollutants into navigable waters), *cert. granted*, No. 18-260, 2019 WL 659786 (U.S. Feb. 19, 2019). The petitioner in *Gwaltney* argued that the court lacked subject-matter jurisdiction, as no violation had been recorded in the weeks immediately preceding the filing of the complaint. 484 U.S. at 55. The court adopted this approach, finding that the citizen-suit provision does not pertain to "wholly past violations." *Id.* at 58.

⁶ See *Upstate Forever v. Kinder Morgan Energy Partners, L.P. (Upstate Forever II)*, 887 F.3d 637, 646 (4th Cir. 2018) (framing the issue as to whether CWA liability could be found for the "indirect discharge of a pollutant through groundwater, which has a direct hydrological connection to navigable waters").

⁷ *Id.* at 648. Reviewing the CWA's language and that of the similar Resource Conservation and Recovery Act of 1976, the court concluded that an addition of discharged materials to navigable waters was sufficient to find a CWA violation. *Id.*; see Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901–6992 (2012). The defendant need not be concurrently engaged in the violation-causing conduct. *Upstate Forever II*, 887 F.3d at 648.

pollutant discharges that do not immediately enter navigable waters from a point source.⁸

This Comment considers the implications of *Upstate Forever II*, including its potential impact on industrial operators, citizen groups seeking to hold industry accountable, and regulatory authorities tasked with enforcing the CWA.⁹ Part I of this Comment examines the CWA's framework and the factual and procedural background of *Upstate Forever II*.¹⁰ Part II of this Comment discusses the Fourth Circuit's reasoning and its analysis of precedent from its sister circuits.¹¹ Finally, Part III of this Comment argues that the Fourth Circuit was correct in its holding, but that its broadened view of CWA applicability has resulted in a circuit split and uncertainty that could have deep ramifications for industry officials, environmentalists, and regulators alike.¹²

I. THE CLEAN WATER ACT AND THE FOURTH CIRCUIT'S *UPSTATE FOREVER* DECISION: AN OVERVIEW

Since the 1972 enactment of the CWA, private individuals and citizen groups have been entitled to act as “private attorneys general,” stepping into the government's stead to initiate legal action against alleged polluters.¹³ Using the CWA's citizen-suit provision, two such citizen groups, *Upstate*

⁸ *Upstate Forever II*, 887 F.3d at 651; see *Haw. Wildlife Fund*, 886 F.3d at 747 (finding a CWA violation for discharges from wastewater wells that indirectly seeped into the Pacific Ocean through groundwater); *Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 510–11 (2d Cir. 2005) (finding that the CWA regulated runoff from a concentrated animal-feeding operation, even though the pollution passed through farm fields before reaching a navigable waterway). The CWA defines a “point source” as “any discernible, confined and discrete conveyance,” and lists examples of such sources, including “any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft.” 33 U.S.C. § 1362(14).

⁹ See *infra* notes 13–108 and accompanying text.

¹⁰ See *infra* notes 13–48 and accompanying text.

¹¹ See *infra* notes 49–78 and accompanying text.

¹² See *infra* notes 79–108 and accompanying text.

¹³ 33 U.S.C. § 1365; see Jeremy A. Rabkin, *The Secret Life of the Private Attorney General*, 61 L. & CONTEMP. PROBS. 179, 190 (1998) (describing citizen-plaintiffs and public interest groups that file lawsuits under the various environmental statutes as “private attorney[s] general”). The phrase “private attorney general” appears to have been first used in a Supreme Court opinion in 1943, but only became more commonplace in the 1970s. *Id.* at 179; see *FCC v. NBC*, 319 U.S. 239, 265 n.1 (1943) (Douglas, J., dissenting) (noting that people representing the public interest rather than an individual's substantive rights had been described as a “private attorney general” in a Second Circuit opinion); William B. Rubenstein, *On What a “Private Attorney General” Is—and Why It Matters*, 57 VAND. L. REV. 2129, 2130 (2004) (noting that the phrase, which is now used almost daily in judicial opinions and scholarly works, has no clear definition). Section 505 of the CWA defines a “citizen” as a person or persons. 33 U.S.C. § 1365(g). The term “person” is further defined to include corporations, partnerships, associations and is not limited to individuals. *Id.* § 1362(5).

Forever and Savannah Riverkeeper, initiated the *Upstate Forever v. Kinder Morgan Energy Partners, L.P. (Upstate Forever I)* litigation in an attempt to hold Kinder Morgan responsible for a pipeline spill and the resulting contamination of the Savannah River and its estuaries.¹⁴ Section A of this Part briefly reviews the CWA's background, its regulatory functions, and its citizen-suit provision, as well as several key statutory definitions.¹⁵ Section B of this Part reviews the factual background and procedural history of the *Upstate Forever II* litigation, from the filing of the complaint to the petition for a writ of certiorari to the Supreme Court of the United States.¹⁶

A. The Clean Water Act and Its Citizen Suit Provision

The 1972 enactment of the CWA was the culmination of a decades-long congressional effort to reduce water pollution and restore the nation's waters to their natural states.¹⁷ Although not Congress's first foray into water-quality control, the CWA established the modern structure for regulating pollution discharges from municipalities and industries.¹⁸ Under the statute,

¹⁴ *Upstate Forever v. Kinder Morgan Energy Partners, L.P. (Upstate Forever I)*, 252 F. Supp. 3d at 490, *vacated*, 887 F.3d 637. *Upstate Forever* is a South Carolina-based environmental nonprofit, focused on protecting land and water resources. *About Upstate Forever*, UPSTATE FOREVER, <https://www.upstateforever.org/about> [<https://perma.cc/QL3B-9W95>]. Savannah Riverkeeper, is a Georgia-based environmental advocacy nonprofit focused entirely on protecting the Savannah River watershed. *About Us*, SAVANNAH RIVERKEEPER, <https://www.savannahriverkeeper.org/about-us.html#/> [<https://perma.cc/RSY8-TM6Z>]. Kinder Morgan is a multinational corporation that owns and operates energy infrastructure including pipelines and terminals for natural gas and other petroleum products. *About Us: Corporate Profile*, KINDER MORGAN, https://www.kindermorgan.com/about_us [<https://perma.cc/85R6-38Q4>]. Also included in the suit is Plantation Pipe Line Company, Inc., the owner of Plantation Pipeline, which discharged the pollution at issue in the case. Complaint ¶ 4, *Upstate Forever I*, 252 F. Supp. 3d 488 (No. 16 Civ. 4003). Plantation Pipe Line Company is owned jointly by Kinder Morgan (51%) and Exxon Mobil Corporation (49%). *Kinder Morgan Buying Control of Plantation Pipeline*, N.Y. TIMES, May 4, 1999, at C4.

¹⁵ See *infra* notes 17–29 and accompanying text.

¹⁶ See *infra* notes 30–48 and accompanying text.

¹⁷ 33 U.S.C. §§ 1313–1342; see N. William Hines, *History of the 1972 Clean Water Act: The Story Behind How the 1972 Act Became the Capstone on a Decade of Extraordinary Environmental Reform*, 4 GEO. WASH. J. ENERGY & ENVTL. L. 80, 87 (2013) (discussing congressional dissatisfaction with water pollution control efforts of the 1950s and 1960s and a desire to eliminate obstacles to improving water quality). Known today as the Clean Water Act, the Federal Water Pollution Control Act Amendments of 1972 aimed to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251. The CWA made it a national goal to eliminate the discharge of pollutants by 1985 and established an interim goal of water quality suitable for fishing and recreation by mid-1983. *Id.* § 1251(a)(1)–(2).

¹⁸ Water Quality Improvement Act of 1970, Pub. L. 91-224, 84 Stat. 115; Water Quality Act of 1965, Pub. L. 89-234, 79 Stat. 903; Water Pollution Control Act of 1956, Pub. L. 84-660; Federal Water Pollution Control Act of 1948, Pub. L. No. 80-845, 62 Stat. 1160; see 33 U.S.C. §§ 1251–1387 (authorizing the EPA to implement pollution control permitting programs and to establish water quality standards). The CWA marked a significant shift from Congress’s first major attempt to control water quality, the Federal Water Pollution Control Act of 1948 (“FWCPA”)

any individual, corporation, or municipality seeking to discharge pollutants into a waterway must first obtain a permit through the CWA's National Pollutant Discharge Elimination System ("NPDES").¹⁹ Each NPDES permit sets out specific limits on the discharge of various contaminants and requires the permit holder to implement specified pollution-reducing technology.²⁰ These permits are only issued for discharges from a "point source" such as pipelines or wells.²¹ Nonpoint sources, like agricultural runoff, do not require NPDES permits and are excluded from the CWA's purview.²² The permit requirement is further restricted to pollutant discharges into "navigable waters," a statutory term of art defined as "waters of the United States."²³ Exceeding a permit's limitations or discharging without a NPDES permit is considered unlawful.²⁴

The CWA tasks the Environmental Protection Agency ("EPA") administrator with the regulatory administration of the statute and the NPDES

and its pre-1972 amendments. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 151 (4th Cir. 2000) (en banc) (noting that the CWA constituted "a major change" in the enforcement of federal water pollution control); CLAUDIA COPELAND, CONG. RESEARCH SERV., CLEAN WATER ACT: A SUMMARY OF LAW 2 (2016), <https://fas.org/sgp/crs/misc/RL30030.pdf> [<https://perma.cc/6ZZ9-TV9K>]. The original FWCPA placed emphasis on state and local efforts to create water quality standards but proved difficult to enforce, as authorities struggled to attribute standards violations to particular polluters. COPELAND, *supra*, at 2. Rather than determine responsibility for pollution after the fact, the CWA limits discharges at the outset, prescribing through permits set amounts of pollutants that each industrial or municipal facility can discharge. *Id.* at 5–6.

¹⁹ 33 U.S.C. § 1342. A "pollutant" is broadly defined under the CWA as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." *Id.* § 1362. National Pollutant Discharge Elimination System ("NPDES") permits are required for the more than 65,000 industrial and municipal facilities discharging such materials into the nation's waters, as well as for the more than 150,000 municipal and industrial facilities discharging storm water. COPELAND, *supra* note 18, at 5.

²⁰ 33 U.S.C. §§ 1311–1314, 1342. The CWA instructed the EPA administrator to expeditiously establish effluent limitations for various pollutants, considering the "best practicable control technology" for the pollutant or the "best available technology economically achievable." *Id.* § 1311(b)(1)–(2). When the established limitations would still interfere with the CWA's goal of improved water quality, the EPA administrator is authorized to establish stronger limitations to ensure such water quality improvement. *Id.* § 1312(a).

²¹ *Id.* § 1362(14).

²² *Id.*

²³ *Id.* § 1362(7). Given the opportunity to interpret the term "navigable waters" in *Rapanos v. United States*, the Supreme Court was unable to reach a majority decision. 545 U.S. 715. A plurality of the justices agreed that "navigable waters" refers only to those "permanent, standing or continuously flowing bodies of water" and not to "channels through which water flows intermittently or ephemerally." *Id.* at 739. Justice Kennedy, in his concurrence, disagreed with the plurality's definition, instead concluding that the waters need only have a "significant nexus" to some navigable waterway. *Id.* at 782 (Kennedy, J., concurring).

²⁴ 33 U.S.C. § 1311(a). The idea that all pollution is unlawful, unless expressly permitted by the government, is a key CWA attribute. COPELAND, *supra* note 18, at 5.

program.²⁵ These powers may be delegated to state environmental agencies upon application to the EPA.²⁶ Both the EPA and state agencies are authorized to enforce the statute's provisions, and may impose civil or administrative penalties or bring criminal actions against alleged violators.²⁷ The CWA also includes a provision for citizen suits, authorizing any citizen or citizen group to bring a civil suit against any entity alleged to be in violation of a statutory limitation or agency-issued directive on the discharge of pollutants.²⁸ Such suits, over which federal district courts have jurisdiction, are intended to fill the void left when the government is unable or unwilling to ensure CWA compliance.²⁹

B. Upstate Forever's *Factual Background and Procedural History*

In December 2014, citizens of Anderson County, South Carolina, came across signs of a gasoline spill in an area where an underground pipeline

²⁵ 33 U.S.C. §§ 1251(d), 1342(a).

²⁶ *Id.* § 1342(b). Although the EPA is the designated NPDES administrator, a state may submit a comprehensive application detailing a plan for a state-administered program. *Id.* § 1342(b). Forty-six states have this delegated authority today. *About NPDES*, EPA, <https://www.epa.gov/npdes/about-npdes> [<https://perma.cc/WKX5-TT8H>].

²⁷ 33 U.S.C. § 1319(b)–(d).

²⁸ *Id.* § 1365(a). A citizen may also file suit against the EPA Administrator, alleging that the Administrator has failed to perform any non-discretionary act or duty required by the statute. *Id.* § 1365(a)(2). Prior to commencing a suit, the plaintiff must give 60-days notice to the EPA Administrator, the state in which the alleged violation is occurring, and to the alleged violator. *Id.* § 1365(b)(1). The suit cannot be filed, however, if the EPA Administrator or state agency is actively prosecuting the alleged violator. *Id.* Under the CWA's citizen suit provision, an environmental group may itself have standing to sue, provided that its members have standing to sue on their own. *Friends of the Earth*, 528 U.S. at 181.

²⁹ 33 U.S.C. § 1365(a); see *Gwaltney*, 484 U.S. at 62 (finding the “central purpose” of the citizen suit provision “to abate pollution when the government cannot or will not command compliance”); see also David Allan Feller, *Private Enforcement of Federal Anti-Pollution Laws Through Citizen Suits: A Model*, 60 DENV. L.J. 553, 555 (1982) (noting that Congress added a citizen suit provision to the CWA in an effort to ensure the act's enforcement “in the face of official inaction”); Leslie K. McAllister, *Regulation by Third-Party Verification*, 53 B.C. L. REV. 1, 1, 21 (2012) (detailing the limited ability of environmental agencies to ensure CWA compliance). The provision was intended to encourage the EPA and “corps of private attorneys general” to work collaboratively to ensure full enforcement of the statute. Feller, *supra* at 553–55. This citizen-suit provision of the CWA was modeled off of a similar provision in the Clean Air Act, which was extensively debated during that statute's legislative hearings. Richard E. Schwartz & David P. Hackett, *Citizen Suits Against Private Industry Under the Clean Water Act*, 17 NAT. RES. LAW. 327, 328–31 (1984). The provision has been used frequently and enforcement more often occurs through private actions than through federal enforcement litigation. Ryan, *supra* note 3 at 20. In 2016, for instance, a citizen was listed as a plaintiff in fifty of seventy-nine reported federal CWA decisions, whereas the federal government was only listed as plaintiff on ten occasions. *Id.* Federal district courts have jurisdiction over all such citizen suits, through an express statutory grant. 33 U.S.C. § 1365(a).

ran.³⁰ The pipeline, owned by Plantation Pipe Line, a subsidiary of Kinder Morgan, had sprung a leak when a patch failed, resulting in the discharge of 369,000 gallons of petroleum products.³¹ Kinder Morgan repaired the pipeline shortly after learning of the failure.³² The company soon began remediation efforts under the supervision of the South Carolina Department of Health and Environmental Control (“DHEC”).³³ Within a year of the spill, Kinder Morgan and its contractors had removed approximately 209,000 gallons of the spilled gasoline from the land.³⁴ Although the discharge initially only contaminated the soil and surrounding groundwater, it was located within 1,000 feet of Browns Creek and 400 feet of Cupboard Creek, both tributaries of the Savannah River.³⁵ One month later, in January 2015, a sheen of petroleum was visible in Browns Creek, and subsequent testing revealed that the levels of benzene in the water far exceeded the permissible standard under federal regulations.³⁶

³⁰ *Upstate Forever II*, 887 F.3d at 643. The citizens encountered the smell of gasoline, puddles of a gasoline-like substance, and dead plants. Complaint, *Upstate Forever I*, *supra* note 14, ¶ 5.

³¹ *Upstate Forever II*, 887 F.3d at 643. The amount of discharged material is not in dispute, but is referred to interchangeably as gasoline, oil, and petroleum product by the court and parties. See *id.* at 643–44 (referring to the discharged material as gasoline); *Upstate Forever I*, 252 F. Supp. 3d at 491 (referring to the discharged material as petroleum product).

³² *Upstate Forever II*, 887 F.3d at 644. It is unclear how Kinder Morgan received notice of the discharge, but the plaintiffs alleged that the defendant did not itself discover or detect the spill. Complaint, *Upstate Forever I*, *supra* note 14, ¶ 5.

³³ *Upstate Forever II*, 887 F.3d at 644. The EPA has delegated NPDES permitting authority to South Carolina’s DHEC, and the state agency is now charged with carrying out the administration and enforcement of the NPDES program within its borders. *NPDES State Program Information: State Program Authority*, EPA, <https://www.epa.gov/npdes/npdes-state-program-information> [https://perma.cc/92R7-DCC5]. South Carolina’s NPDES permit program was authorized on June 10, 1975. *Id.*; see *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 629 F.3d 387, 390 (4th Cir. 2011) (noting that DHEC is the authorized state permit issuer); see also *supra* note 26 and accompanying text (discussing the CWA’s provision for state delegation).

³⁴ *Upstate Forever II*, 887 F.3d at 643. The plaintiffs alleged that Kinder Morgan had recovered “no significant amount” of contaminants since late 2015 and that at least 160,000 gallons remained unrecovered. *Id.*; Brief of Appellant at 2, *Upstate Forever II*, 887 F.3d 637 (No. 17-1640), 2017 WL 3026327, at *2.

³⁵ *Upstate Forever II*, 887 F.3d at 641, 643; Complaint, *Upstate Forever I*, *supra* note 14, ¶ 11.

³⁶ Complaint, *Upstate Forever I*, *supra* note 14, ¶ 17. That the spilled petroleum products eventually entered the creeks is not disputed in the defendants’ filings. See, e.g., Brief of Appellees at 2, *Upstate Forever II*, 887 F.3d 637 (No. 17-1640), 2017 WL 3887952, at *2; Defendants’ Brief in Support of Their Motion to Dismiss, *Upstate Forever I*, 252 F. Supp. 3d 488 (No. 16 Civ. 4003), 2017 WL 3699731, at *6, *11. The defendants acknowledged that the Corrective Action Plan they submitted to DHEC included a comprehensive proposal to remove spilled material from soil, groundwater, and surface water. Brief of Appellees, *Upstate Forever II*, *supra*, at 2. Benzene is categorized as “a major public health concern” by the World Health Organization and exposure to benzene can have adverse health effects on humans, from headaches and dizziness to an increased risk of cancer. WORLD HEALTH ORG., EXPOSURE TO BENZENE: A MAJOR PUBLIC HEALTH CONCERN 1 (2010), <http://www.who.int/ipcs/features/benzene.pdf> [https://perma.cc/RN5F-

Concerned that Kinder Morgan continued to fail to comply with explicit DHEC instructions on pollution testing and cleanup, Upstate Forever and Savannah Riverkeeper initiated a citizen suit against the company in December 2016.³⁷ In their complaint, the plaintiffs alleged that Kinder Morgan continued to ignore environmental standards and agency deadlines and did not issue an appropriate remediation plan.³⁸ The plaintiffs also alleged that DHEC and the EPA failed to adequately address the defendants' violations by declining to force them into compliance through litigation.³⁹

The defendants moved to dismiss the complaint in February 2017, and the U.S. District Court for the District of South Carolina granted their motion, finding that the court lacked subject-matter jurisdiction because the CWA was inapplicable to the facts.⁴⁰ The district court determined that the discharge of petroleum products constituted nonpoint source pollution—contaminants not covered by the CWA—as the ruptured pipeline did not directly discharge into “navigable waters.”⁴¹ According to the court, the plaintiffs failed to allege a

TPVJ]. Recognizing the dangers associated with benzene, EPA has promulgated regulations, which provide that the maximum contaminant level for benzene in drinking water is 0.005mg/L, while the maximum contaminant level goal is zero mg/L. 40 C.F.R. § 141.61 (2018); *id.* § 141.61 subpt. Q, app. B. Benzene levels in Browns Creek, however, reached levels of 0.0234 mg/L, more than four times the federal standard. Complaint, *supra* note 14, ¶ 17.

³⁷ *Upstate Forever I*, 252 F. Supp. 3d. at 490. Rather than test the pollution levels near the source of the discharge, as instructed by DHEC in March 2016, the defendants took samples on the opposite side of the creek, and only began sampling at the appropriate location in August 2016, after the plaintiffs took their own samples. Complaint, *supra* note 14, ¶¶ 20–21. Despite the defendants' deployment of oil absorbent booms in the contaminated water bodies, the plaintiffs alleged that the devices had been neglected and that defendants failed to replace them when they became saturated with petroleum products. *Id.* ¶ 26.

³⁸ Complaint, *Upstate Forever I*, *supra* note 14, ¶¶ 35–37. Plantation's Corrective Action Plan was due on March 25, 2016, but was not submitted until September 5, 2016. *Id.* ¶ 35. The company also ignored DHEC's instructions to submit a Pore Water Sampling Plan, writing that it refused to comply with the request a month after the original deadline had passed. *Id.* The proposed Corrective Action Plan was also criticized by environmental groups as containing too long a timeframe for the spill cleanup. Mike Eads, *KM Plan for Belton Spill Criticized*, INDEP. MAIL (Nov. 21 2016), <https://www.independentmail.com/story/news/2016/11/21/km-spill-site-gets-worse-allegedly/94225524> [<https://perma.cc/Y5CV-CJXJ>]; see R. 2016-048, ANDERSON CTY. COUNCIL (2016), https://www.southernenvironment.org/uploads/words/docs/Anderson_County_Belton_resolution.pdf [<https://perma.cc/Q5Z5-LTMZ>] (requesting that DHEC order Kinder Morgan to clean up the released petroleum products expeditiously).

³⁹ Complaint, *Upstate Forever I*, *supra* note 14, ¶ 38. It is a CWA statutory requirement that a citizen may not bring an action if a federal or state authority is already pursuing criminal or civil charges to remedy the violation. 33 U.S.C. § 1365(b)(1)(B).

⁴⁰ *Upstate Forever I*, 252 F. Supp. 3d at 498. The court also dismissed the case pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, finding that the plaintiffs had failed to state a valid CWA claim. *Id.*

⁴¹ *Id.* at 494 (referring to the “migration of pollutants on top of or through soil and ground water” as nonpoint source pollution). The court also found that the plume of discharged pollutants itself could not be considered a point source, as the defendants did not utilize a “discrete convey-

continuing violation and merely pointed to the enduring impact of a prior discharge.⁴² The court also declined to adopt the plaintiffs' assertions that the CWA applied to groundwater "hydrologically connected" to surface water, instead finding that the statute's language pointed to "navigable waters" and "ground waters" as separate areas of regulation.⁴³

The plaintiffs timely filed a notice of appeal, arguing that the district court incorrectly labeled the contaminants as "nonpoint source pollution."⁴⁴ They also requested that the Fourth Circuit vacate the district court's conclusion that the CWA is inapplicable to groundwater "hydrologically connected" to surface water.⁴⁵ A divided panel of the Fourth Circuit reversed the district court's decision, finding the CWA applicable to the spill from Kinder Morgan's ruptured pipeline.⁴⁶ In August 2018, Kinder Morgan filed a petition for writ of certiorari to the Supreme Court, challenging both conclusions.⁴⁷ While the petition was pending, the Supreme Court, on February 19, 2019, granted certiorari on the issue of discharges that pass through groundwater in the related Ninth Circuit case, *Hawai'i Wildlife Fund v. County of Maui*.⁴⁸

II. THE LEGAL CONTEXT OF THE FOURTH CIRCUIT'S DECISION

The United States Court of Appeals for the Fourth Circuit had to resolve two distinct issues in *Upstate Forever v. Kinder Morgan Energy Partners, L.P. (Upstate Forever II)*.⁴⁹ First, the court examined whether the pipeline rupture involved "point source" contamination and constituted an ongoing CWA violation.⁵⁰ Second, the court considered whether the release of pollutants to navigable waters through hydrologically connected groundwater constitutes a "discharge" under the CWA.⁵¹ Section A of this Part re-

ance" or otherwise channel the pollutants through the groundwater to navigable waters. *Id.* at 494–96.

⁴² *Id.* at 494.

⁴³ *Id.* at 497–98.

⁴⁴ *Upstate Forever II*, 887 F.3d at 645.

⁴⁵ Brief of Appellant, *Upstate Forever II*, *supra* note 34, at 9, 26; see *Upstate Forever I*, 252 F. Supp. 3d at 497–98 (distinguishing "navigable waters" from "ground waters" and determining that pollution discharge to groundwaters is outside the scope of the CWA).

⁴⁶ *Upstate Forever II*, 887 F.3d at 652–53. Kinder Morgan filed a petition for rehearing and rehearing en banc, but the petition was denied. Order, *Upstate Forever II*, 887 F.3d 637 (No. 17-1640), ECF No. 120.

⁴⁷ Petition for Writ of Certiorari, *Kinder Morgan Energy Partners, L.P. v. Upstate Forever*, No. 18-268 (U.S. Aug. 28, 2018), https://www.supremecourt.gov/DocketPDF/18/18-268/60921/20180828122328739_Kinder%20Morgan%20Cert%20Petition.pdf [<https://perma.cc/F4XD-33YH>].

⁴⁸ *County of Maui v. Haw. Wildlife Fund*, No. 18-260, 2019 WL 659786 (U.S. Feb. 19, 2019), *granting cert. to Haw. Wildlife Fund*, 886 F.3d 737.

⁴⁹ *Upstate Forever v. Kinder Morgan Energy Partners, L.P. (Upstate Forever II)*, 887 F.3d 637, 649, 651 (4th Cir. 2018)

⁵⁰ *Id.* at 649.

⁵¹ *Id.* at 651.

views the Fourth Circuit's holding that Kinder Morgan's pipeline qualifies as a "point source" and that there is an ongoing violation even if the point source is itself no longer discharging pollutants.⁵² Section B of this Part discusses how the court reached its conclusion that the CWA applies to pollutant discharges that travel through "hydrologically connected" groundwater.⁵³

A. The Fourth Circuit's Finding of an Ongoing Discharge Violation

In reviewing the district court's finding of no subject matter jurisdiction, the Fourth Circuit considered the Supreme Court's 1987 ruling in *Gwaltney of Smithfield v. Chesapeake Bay Foundation* requiring that a CWA violation be ongoing.⁵⁴ Specifically, the court addressed whether Kinder Morgan's quick repair of the pipeline prohibited the plaintiff environmental groups from initiating the litigation.⁵⁵ The Fourth Circuit began its analysis with a review of the CWA's statutory framework and circuit precedent.⁵⁶ Interpreting the statute's plain language, the court determined that a citizen need only allege that a polluter be in violation of the CWA through the ongoing addition of a pollutant to navigable waters; the statute does not require that the point source itself also continue to release the pollutant.⁵⁷ In arriving at this conclusion, the Fourth Circuit looked to its 2015 decision in *Goldfarb v. Mayor of Baltimore*, where it emphasized that the status of a defendant's pollution-causing conduct was irrelevant.⁵⁸ Although

⁵² See *infra* notes 54–65 and accompanying text.

⁵³ See *infra* notes 66–78 and accompanying text.

⁵⁴ *Upstate Forever II*, 887 F.3d at 646–47; see *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 59 (1987) (concluding that the citizen-suit provision of the CWA is forward-looking and meant to abate ongoing pollution). The Supreme Court in *Gwaltney* emphasized that citizen suits were intended only to supplement government enforcement actions, and that permitting citizen suits for "wholly past" violations would frustrate Congress's intent in passing the statute. *Gwaltney*, 484 U.S. at 60. The citizen suit is therefore focused only on "prospective relief," including the possibility of an injunction; civil penalties can only be sought in a suit that also seeks to enjoin the polluter. *Id.* at 58–59.

⁵⁵ *Upstate Forever II*, 887 F.3d at 648 (quoting *Am. Cone Ass'n v. Murphy Farms*, 412 F.3d 536, 540 (4th Cir. 2005)) (holding that remedial efforts "do not *ipso facto* establish the absence of federal jurisdiction over a citizen suit").

⁵⁶ *Upstate Forever II*, 887 F.3d at 647–48; see 33 U.S.C. §§ 1311(a), 1362(12)(A), 1365 (2012); *Goldfarb v. Mayor of Baltimore*, 791 F.3d 500, 513 (4th Cir. 2015).

⁵⁷ *Upstate Forever II*, 887 F.3d at 647–48; see 33 U.S.C. §§ 1362(12)(A) ("The term 'discharge of a pollutant' and the term 'discharge of pollutants' each means . . . any addition of any pollutant to navigable waters from any point source"). The court explained that indirect discharges of pollutants to navigable waters could result in a delay between the cessation of the discharge from the point source and the commencement of the contamination of the navigable waters, but emphasized that the CWA contains no language prohibiting the finding of a violation for citizen-suit purposes in such a scenario. *Upstate Forever II*, 887 F.3d at 648.

⁵⁸ *Upstate Forever II*, 887 F.3d at 647; see *Goldfarb*, 791 F.3d at 513 (concluding that the relevant jurisdictional question for a citizen suit was not whether the defendants' pollution-causing conduct had ceased, but whether there was a present and continuing violation of a limitation in a

at least some of the defendants' environment-damaging activities occurred in the past, the *Goldfarb* court concluded that the plaintiffs properly alleged an ongoing violation, because the materials continued to migrate away from the leakage site.⁵⁹ The Fourth Circuit therefore concluded in *Upstate Forever II* that the district court's determination that it lacked jurisdiction was inapposite, because the plaintiffs had properly alleged an ongoing violation due to the continued migration of spilled gasoline into the waterways.⁶⁰

In reaching this conclusion, the Fourth Circuit reviewed decisions of the United States Courts of Appeals for the Second and Fifth Circuits, which had previously analyzed disputes over the "ongoing violation" requirement.⁶¹ In 1993, in *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co.*, the Second Circuit concluded that the prior discharge of lead shot from skeet shooting at Remington's gun club into the Long Island Sound did not constitute a continuing CWA violation.⁶² The Fourth Circuit, however, distinguished the case as one involving pollutants that had already completely entered the waterway and thus there was no further discharge of bullets into the water.⁶³ The Fourth Circuit also analyzed the Fifth Circuit's 1985 decision in *Hamker v. Diamond Shamrock Chemical Co.*, where the plaintiffs alleged that a pipeline owned by Diamond Shamrock Chemical

regulatory permit or standard). While the court's decision in *Goldfarb* involved a violation of a different statute—the Resource Conservation and Recovery Act of 1976—the court in *Upstate Forever II* concluded that the language of the statutes was similar. *Upstate Forever II*, 887 F.3d at 647. The court flatly rejected the dissent's assertion that *Goldfarb* is unhelpful. *Id.* at 647 n.6; *see id.* at 662 (Floyd, J., dissenting) (arguing that the majority misplaced reliance on *Goldfarb* because that case did not involve a determination of whether a violation was ongoing).

⁵⁹ *Goldfarb*, 791 F.3d at 512.

⁶⁰ *Upstate Forever II*, 887 F.3d at 649. The court also reached the subsidiary conclusion that the pipeline "unambiguously qualifies" as the point source at issue. *Id.* at 647. In determining that a violation could be found even after a point source had stopped releasing contaminants, the court declined to address the dissent and defendant's arguments that the groundwater and soil were a "nonpoint source," that therefore rendered the CWA inapplicable. *Id.* at 647–48; *id.* at 647 n.7. *But see id.* at 661–62 (Floyd, J., dissenting) (referring to the migration of pollutants through the soil and groundwater as nonpoint source pollution); Brief of Appellees, *Upstate Forever II*, *supra* note 36, at 31–32 (arguing that the discharges "squarely fall within the definition of nonpoint source pollution").

⁶¹ *See Upstate Forever II*, 887 F.3d at 648 (finding an ongoing CWA violation despite a delay between the release of the pollutants from a point source and their discharge into a waterway); *Conn. Coastal Fishermen's Ass'n v. Remington Arms Co.*, 989 F.2d 1305, 1313 (2d Cir. 1993) (finding no CWA violation despite a bullet that was actively decomposing and releasing pollutants into a waterway); *Hamker v. Diamond Shamrock Chem. Co.*, 756 F.2d 392, 397 (5th Cir. 1985) (finding no CWA violation in the residual effects and continued leaking of previously discharged oil into groundwater).

⁶² *Conn. Coastal Fishermen's Ass'n*, 989 F.2d at 1313. Since Remington persuasively argued that their shooting club had ceased operation, the court emphasized that the plaintiff had to provide evidence that continuing violations would be likely. *Id.* The court concluded the plaintiffs presented no evidence that Remington was likely to make further discharges. *Id.*

⁶³ *Upstate Forever II*, 887 F.3d at 649.

Co. leaked petroleum into their groundwater and a stream on their property.⁶⁴ The Fourth Circuit qualified the *Hamker* decision as inapplicable to its *Upstate Forever II* decision, because the plaintiffs in that case did not allege any discharge into “navigable waters,” but had merely argued a CWA violation for a groundwater discharge.⁶⁵

B. The Clean Water Act’s (Limited) Applicability to Groundwater

After concluding that the plaintiffs had successfully alleged an “ongoing violation” of the CWA, the Fourth Circuit examined the CWA’s broader applicability to the discharge of contaminants that do not directly enter surface waters from a point source.⁶⁶ Specifically, the court addressed the plaintiffs’ contention that a CWA violation could be found when contaminants are discharged into groundwater, but make their way into navigable waters through a “direct hydrological connection.”⁶⁷ The court began its analysis with a review of the Supreme Court’s 2006 decision in *Rapanos v. United States*, in which the Court determined that wetlands and seasonal streams fell outside the CWA’s definition of “navigable waters.”⁶⁸ The Fourth Circuit followed the reasoning of Justice Antonin Scalia’s plurality opinion in *Rapanos* in determining that the CWA forbids only the addition of pollutants to navigable waters, but contains no language on whether that addition needs to be “direct” from the point source.⁶⁹ Reviewing the statute’s language, the Fourth Circuit determined that a discharge must only

⁶⁴ *Id.*; *Hamker*, 756 F.2d at 394. The Hamkers sought an injunction and civil penalties, arguing that the defendants’ cleanup efforts were deficient and that they suffered lasting damage to their ability to water their livestock. *Id.*

⁶⁵ *Upstate Forever II*, 887 F.3d at 649; see *Hamker*, 756 F.2d at 397 (holding that the post-spill seepage of oil into groundwater and grasslands did not result in a CWA violation). The Fourth Circuit also noted that the pollutants in the *Hamker* suit were not entering a navigable waterway, but that the complaint only alleged they were “leaking into ground water” and “grasslands.” *Upstate Forever II*, 887 F.3d at 649. The *Hamker* decision, however, contained language contradicting the *Upstate Forever II* decision, as it found that the continuing seepage of previously discharged oil was not actively coming from a point source. *Hamker*, 756 F.2d at 397. The Fourth Circuit, however, acknowledged that such a position would contradict its earlier *Goldfarb* decision, and declined to adopt the Fifth Circuit’s reasoning. *Upstate Forever II*, 887 F.3d at 649 & n.9; see *supra* notes 58–59 and accompanying text for a further discussion of *Goldfarb*’s holding.

⁶⁶ *Upstate Forever II*, 887 F.3d. at 649.

⁶⁷ *Id.*

⁶⁸ *Id.* at 649–50; see *Rapanos v. United States*, 547 U.S. 715, 734 (2006) (limiting the definition of “navigable waters” and finding that the term pertains only to permanent water bodies).

⁶⁹ *Upstate Forever II*, 887 F.3d at 649–50; see *Rapanos*, 547 U.S. at 743 (noting that the CWA simply forbids the “addition of any pollutant to navigable waters” and contains no language on directness of the discharge).

come “from” a point source, and that the point source need not itself directly feed into the navigable waters.⁷⁰

The Fourth Circuit observed that other circuits had dismissed the contention that a discharge from a point source must directly enter the navigable waters.⁷¹ In 2018, in *Hawai'i Wildlife Fund v. County of Maui*, the Ninth Circuit examined whether the discharge of sewage from wastewater holding wells through the groundwater and into the Pacific Ocean constituted a CWA violation.⁷² The Ninth Circuit concluded that the indirect discharge could indeed constitute such a statutory violation because the pollution came from a defined point source.⁷³ Adopting this reasoning in its *Upstate Forever II* decision, the Fourth Circuit determined that Kinder Morgan could be found to

⁷⁰ See *Upstate Forever II*, 887 F.3d at 650 (determining that the CWA relies upon the word “from” to refer to the “starting point” or “cause” of the discharge, but that it contains no requirement that the discharge directly enter the navigable waterway); see 33 U.S.C. § 1362(12)(A) (“The term ‘discharge of a pollutant’ . . . means any addition of any pollutant to navigable waters from any point source . . .”). The court added that an opposite finding would require that pollutants be “seamlessly channeled,” a contention that would conflict with findings by sister circuits. *Upstate Forever II*, 887 F.3d at 650; see *Haw. Wildlife Fund v. County of Maui*, 886 F.3d 737, 747 (9th Cir. 2018) (finding a CWA violation when wastewater seeped from an injection well and into the Pacific Ocean through groundwater), *cert. granted*, No. 18-260, 2019 WL 659786 (U.S. Feb. 19, 2019); *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 510 (2d Cir. 2005) (finding the CWA applicable to runoff from a concentrated animal feeding operation, even though the pollution passed through farm fields before reaching a navigable waterway); *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 119 (2d Cir. 1994) (holding that a CWA violation could be found when liquid manure passed through farm fields and into navigable waters).

⁷¹ *Upstate Forever II*, 887 F.3d at 650; see *Haw. Wildlife Fund*, 886 F.3d at 747 (finding that wastewater that seeped from a well into the Pacific Ocean but that did not go through a “confined and discrete conveyance” could nevertheless result in a CWA violation); *Waterkeeper Alliance, Inc.*, 399 F.3d at 510–11 (finding the discharge of manure applied to land from a concentrated animal feeding operation did not have to be “collected” or “channelized” into a navigable waterway for a CWA violation to be found); *Southview Farm*, 34 F.3d at 119 (finding that manure, which passed through farm fields after being discharged from tankers, could result in a CWA violation if it reached navigable waters).

⁷² *Haw. Wildlife Fund*, 886 F.3d at 746–47. As in *Upstate Forever II*, the fact that pollutants reached “navigable waters” was not in dispute. *Id.* at 742; see *Upstate Forever II*, 887 F.3d at 641 (noting it was undisputed that gasoline had seeped into the Savannah River watershed). The defendants in *Hawai'i Wildlife Fund*, however, contended that the pollution must reach the water though a “confined, discrete conveyance” and that an indirect discharge to the Pacific Ocean did not require a NPDES permit. 886 F.3d at 745–46.

⁷³ *Haw. Wildlife Fund*, 886 F.3d at 749. The Ninth Circuit emphasized that the injection wells were similar to a storm water drain system in that they “confined” and “contained” the pollutants before the pollutants made their way to “navigable waters.” *Id.* at 746. The courts have repeatedly emphasized that a pollutant must at some point be purposefully collected or channeled in order for an activity to qualify as a point source. See *Greater Yellowstone Coalition v. Lewis*, 628 F.3d 1143, 1152–53 (9th Cir. 2010) (concluding that a storm drain involves the collection or channelization of pollutants, therefore qualifying as a point source, and that an unpermitted release from the drain that travels through groundwater before reaching a navigable water would constitute a CWA violation); see also *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45 (5th Cir. 1990) (finding that sediment collected in human-created basins and that discharged into navigable waters through the flow of gravity could constitute a CWA violation).

have violated the CWA, even though its discharged contaminant traversed some medium between the point source and the navigable waterway.⁷⁴

Despite finding a potential CWA violation from indirect discharges, the Fourth Circuit cautioned that there must be a sufficient connection between the discharge from the point source and the navigable waters.⁷⁵ Relying on the EPA's own interpretation of its authority under the CWA, the court identified several factors for determining if a "direct hydrological connection" exists, including the distance the pollutants must travel and the traceability of the pollutants back to the point source.⁷⁶ A further factor is the absence of other alternative or contributing causes.⁷⁷ The Fourth Circuit ultimately concluded that the gasoline pollutants in the creeks only needed to travel a short distance from the pipeline, were directly traceable to the pipeline, and had no other potential cause.⁷⁸

III. THE FOURTH CIRCUIT CORRECTLY APPLIED PRECEDENT, BUT THE LEGAL LANDSCAPE REMAINS UNCERTAIN

The United States Court of Appeals for the Fourth Circuit's decision in *Upstate Forever v. Kinder Morgan Energy Partners, L.P. (Upstate Forever II)* is a significant contribution to the ongoing discussion on the reach of the CWA.⁷⁹ Adhering to the statute's intentionally broad scope, the court cor-

⁷⁴ *Upstate Forever II*, 887 F.3d at 651.

⁷⁵ *Id.* The court emphasized that there should be a "clear connection" in instances involving a discharge that travels through groundwater. *Id.*

⁷⁶ *Id.* (citing National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2960, 3015 (Jan. 12, 2001) (to be codified at 40 C.F.R. pts. 122 & 412) [hereinafter CAFO Standards]). In multiple rule promulgations, the EPA has adopted the position that the CWA is applicable to pollution discharges that travel through groundwater hydrologically connected to some surface water. CAFO Standards, 66 Fed. Reg. at 3015. The Ninth Circuit in *Hawai'i Wildlife Fund* also emphasized that the connection must be sufficiently traceability. 886 F.3d at 749. The Ninth Circuit expressly rejected a lower court's contention that the way in which pollutants reach navigable water is immaterial for CWA liability. *Id.* Instead, the court found it particularly important that pollutants be traceable back to the point source; the conclusive results of a tracer dye study were therefore sufficient to render CWA liability. *Id.*

⁷⁷ *Upstate Forever II*, 887 F.3d at 652.

⁷⁸ *Id.* The court noted that Kinder Morgan did not contend that there was another cause, so that fact was undisputed. *Id.*

⁷⁹ See *Upstate Forever v. Kinder Morgan Energy Partners, L.P. (Upstate Forever II)*, 887 F.3d 637, 652–53 (4th Cir. 2018) (finding an unplanned discharge of petroleum that passes through groundwater and soil before entering a river sufficient to make the Clean Water Act ("CWA") jurisdictional). A debate over the CWA's reach is playing out within the federal government, and the EPA and U.S. Army Corps of Engineers in 2015 issued a rule to clarify the CWA's definition of "waters of the United States" and to better ensure CWA predictability and applicability, known as the "WOTUS Rule." Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328 and in scattered parts of 40 C.F.R.). Shortly after entering office, however, President Trump issued an Executive Order to

rectly resolved two critical jurisdictional issues involving the CWA.⁸⁰ First, the court accurately interpreted the statute's language and properly applied its own circuit precedent in finding a present and ongoing CWA violation.⁸¹ Next, on an issue of first impression for the Fourth Circuit, the court appropriately rooted its finding of liability for pollution discharges that travel through groundwater in the statute's language and precedent from its sister circuits.⁸² The court's resolution of both issues has resulted in a circuit split, which may cause uncertainty for polluters and environmentalists alike.⁸³ An

review the WOTUS Rule and the EPA issued a notice to revise the rule. Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule, 82 Fed. Reg. 12,497 (Mar. 3, 2017); Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899 (July 27, 2017) (to be codified at 33 C.F.R. pt. 328 and in scattered parts of 40 C.F.R.). In December 2018, the Trump administration re-issued a proposed rule. Revised Definition of "Waters of the United States," 84 Fed. Reg. 4154 (Feb. 14, 2019) (to be codified at 33 C.F.R. pt. 328 and in scattered parts of 40 C.F.R.). The proposed rule would reduce the CWA's scope by eliminating its applicability to seasonal streams and wetlands not adjacent to statutorily protected water bodies. Coral Davenport, *Trump Plan Would Weaken Rules Protecting Wetlands from Pollutants*, N.Y. TIMES, Dec. 10, 2018, at A17. The Obama-era rule has also been subject to significant litigation, including several enjoinder attempts. See *S.C. Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959, 969–70 (D.S.C. 2018) (enjoining nationwide the Trump Administration's attempt to suspend the Obama-era WOTUS Rule); *Texas v. EPA*, No. 15-cv-0162, 2018 WL 4518230, at *1 (S.D. Tex. Sept. 12, 2018) (temporarily enjoining the WOTUS rule in Texas, Louisiana, and Mississippi).

⁸⁰ See *Upstate Forever II*, 887 F.3d at 649, 651 (holding first that a point source need not continue to discharge for a CWA violation to be ongoing and holding second that the CWA applies to pollution discharges, even if they travel through hydrologically connected groundwater on their way to a navigable waterway); H.R. REP. NO. 92-911, at 131 (1972) ("The Committee fully intends the term 'navigable waters' to be given the broadest possible constitutional interpretation.").

⁸¹ See 33 U.S.C. § 1362(12)(A) (2012) (broadly defining the term "discharge of a pollutant"); *Upstate Forever II*, 887 F.3d at 647–48 (determining that the statute's language is focused on the "addition" of pollutants to navigable waters and that the point source need not itself continue to actively release the pollutants); *Goldfarb v. Mayor of Baltimore*, 791 F.3d 500, 513 (4th Cir. 2015) (finding that the relevant question in determining liability is whether the violation is ongoing, not whether the conduct that caused the violation continues).

⁸² See 33 U.S.C. § 1362(12)(A) (indicating that a pollution discharge must come "from" a point source but containing no language requiring that the point source feed directly into navigable waters); *Upstate Forever II*, 887 F.3d at 650 (finding that a point source needs to be the "starting point or cause of a discharge" but that it doesn't have to directly convey the pollutants to navigable waters); *Haw. Wildlife Fund v. County of Maui*, 886 F.3d 737, 747, 749 (9th Cir. 2018) (finding a CWA violation when municipal wastewater migrated from injection wells, through groundwater, to the Pacific Ocean), *cert. granted*, No. 18-260, 2019 WL 659786 (U.S. Feb. 19, 2019); *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 119 (2d Cir. 1994) (holding that a CWA violation could be found when liquid manure passed through fields into navigable waters).

⁸³ Compare *Upstate Forever II*, 887 F.3d at 649 (holding that an ongoing violation could be found even when the point source itself is no longer discharging pollutants, so long as the pollutants continue to enter the navigable water), with *Conn. Coastal Fishermen's Ass'n v. Remington Arms Co.*, 989 F.2d 1305, 1312–13 (2d Cir. 1993) (holding that the continuing decomposition of a lead bullet in navigable waterways did not constitute an ongoing CWA violation). The courts also split on the issue of whether a CWA violation may be found when a discharge passes through

opposite conclusion—one which would require a point source to discharge directly into a navigable water—would frustrate the CWA’s purpose and broad public policy goals by creating a significant loophole for polluters.⁸⁴ This would enable polluters to avoid permit requirements and liability by simply discharging pollutants into the ground, regardless of how close the discharge is to navigable waters.⁸⁵

The Fourth Circuit in *Upstate Forever II* correctly found that the plaintiffs alleged sufficient facts to establish an ongoing CWA violation.⁸⁶ Reviewing the statute’s plain language, the court properly determined that CWA violations are caused not by the release of pollutants but by their “addition” to navigable waters.⁸⁷ The court accurately noted that the CWA contains no temporal limitations on the travel of a pollutant from a point source to a navigable waterway; even if the point source has been repaired, a violation may be found if the pollutants eventually make their way to a navigable waterway.⁸⁸

groundwater. Compare *Upstate Forever II*, 887 F.3d at 652–53 (finding a CWA violation for an unplanned pollutant discharge that reaches navigable water by way of hydrologically connected groundwater), and *Haw. Wildlife Fund*, 886 F.3d at 747, 749 (finding a CWA violation when municipal wastewater migrated from injection wells, through groundwater, to the Pacific Ocean), with *Ky. Waterways All. v. Ky. Utils. Co.*, 905 F.3d 925, 931, 933 (6th Cir. 2018) (finding the CWA inapplicable to a coal ash discharge that traveled from a holding pond, through groundwater, into a nearby lake), and *Tenn. Clean Water Network v. Tenn. Valley Auth.*, 905 F.3d 436, 447 (6th Cir. 2018) (finding the CWA inapplicable to coal ash discharges that traveled from a holding pond to a nearby river by way of groundwater). Though the Fourth Circuit in a post-*Upstate Forever II* case purported to adopt the position that discharges to hydrologically connected groundwater are covered by the CWA, it nonetheless rejected a finding of CWA liability for coal ash discharges that made their way to navigable waters through groundwater. *Sierra Club v. Va. Elec. & Power Co.*, 903 F.3d 403, 410 (4th Cir. 2018). The court focused here not on the issue of groundwater contamination, but on the definition of “point source,” finding coal ash ponds to not be sufficiently discernible conveyances within the meaning of the statute. *Id.* at 411.

⁸⁴ See *Upstate Forever II*, 887 F.3d at 652 (noting that a conclusion of no liability for indirect discharges would frustrate the CWA’s purpose); *Ky. Waterways All.*, 905 F.3d at 941 (Clay, J., concurring in part and dissenting in part) (expressing concern that the Sixth Circuit’s finding of no liability for indirect discharges will open a large and unintended loophole).

⁸⁵ *Upstate Forever II*, 887 F.3d at 652.

⁸⁶ See *Id.* at 649 (concluding that the plaintiffs properly alleged a continuing addition of pollutants to a navigable water, thereby meeting the sufficiency requirements for an ongoing violation claim).

⁸⁷ See 33 U.S.C. § 1362(12)(A) (“[T]he term ‘discharge of a pollutant’ . . . means . . . any addition of any pollutant to navigable waters from any point source.”); *Upstate Forever II*, 887 F.3d at 648 (determining that an ongoing discharge should be found if there is an ongoing addition to a navigable waterway).

⁸⁸ See *Upstate Forever II*, 887 F.3d at 648 (concluding that the repair of the pipeline does not absolve the polluter of CWA liability). The court pointed out that the CWA’s definition of a pollutant discharge contains no language prohibiting a delay in the material traveling from the point source to the receiving waterbody. *Id.*; see 33 U.S.C. § 1362(12)(A) (defining “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source” and making no reference to time).

Although this finding is properly grounded in Fourth Circuit precedent, the court's attempt to avoid a circuit split by distinguishing several decisions from its sister circuits on factual differences is unconvincing and weakens its analysis.⁸⁹ In 1985, in *Hamker v. Diamond Shamrock Chemical Co.*, which also involved a point source that had ceased discharging oil, the United States Court of Appeals for the Fifth Circuit found that residual effects from the prior discharge are insufficient to state a claim under the CWA—a decision that directly contradicts the Fourth Circuit's *Upstate Forever II* holding on the ongoing discharge issue.⁹⁰ The Fourth Circuit first argued that *Hamker* did not involve a similar factual issue, but in a footnote acknowledged the unsettling proposition that the *Hamker* decision may contravene the court's other precedent and thus declined to follow its reasoning.⁹¹

The court's conclusion that the plaintiffs had alleged an ongoing violation is nevertheless firmly rooted in Supreme Court precedent.⁹² As the Court emphasized in 1987 in *Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.*, the purpose of including a citizen suit provision in the CWA was to abate or enjoin present and ongoing pollution.⁹³ Abatement of pollution and injunctive relief remains a clear possibility in the alleged cir-

⁸⁹ See *Upstate Forever II*, 887 F.3d at 649 (rejecting decisions from other circuits finding no discharge when point source ceased releasing pollutants); *Goldfarb*, 791 F.3d at 513 (finding that the defendant need not be actively engaged in the violation-causing activity for a violation to be found). But see *Conn. Coastal Fishermen's Ass'n*, 989 F.2d at 1312–13 (finding no liability when the defendant was no longer engaged in the violation-causing activity of discharging bullets into a waterway); *Hamker v. Diamond Shamrock Chem. Co.*, 756 F.2d 392, 397 (5th Cir. 1985) (finding no liability from a past discharge of a pipeline).

⁹⁰ Compare *Hamker*, 756 F.2d at 397 (finding that the “continuing seepage into groundwater of the now-dispersed leaked oil” could not constitute a CWA violation, as it was not coming “from” a point source), with *Upstate Forever II*, 887 F.3d at 650 (finding an ongoing violation because the pollutants came “from” a point source at some earlier time; it did not matter that the point source was not continuing to release pollutants into the environment).

⁹¹ See *Upstate Forever II*, 887 F.3d at 649 n.9 (acknowledging the potential conflict between the Fifth Circuit's *Hamker* decision and the Fourth Circuit's *Goldfarb* decision). The Fourth Circuit also attempted to distinguish the Second Circuit's *Connecticut Coastal Fishermen's Ass'n* case on the ground that it involved a pollutant (lead shot) that had already been added to a navigable waterway. *Id.* at 649; see *Conn. Coastal Fishermen's Ass'n*, 989 F.2d at 1310, 1313. The bullet, however, was continuing to decompose and there is therefore merit to the argument that a pollutant was actively being added to the waters, an argument that contradicts the Fourth Circuit's attempt at differentiation. See *Conn. Coastal Fishermen's Ass'n*, 989 F.2d at 1313 (finding that the CWA's present violation requirement would be undermined if the decomposition of previously deposited pollutants was to be included in its definition).

⁹² See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59 (1987) (finding that the “prospective relief” authorized by the citizen-suit provision of the CWA is only achievable when there is present or future harm that can be remedied); *Upstate Forever II*, 887 F.3d at 648 (finding an ongoing CWA violation).

⁹³ See *Gwaltney*, 484 U.S. at 61 (finding support in the legislative history of the CWA for the idea that the citizen-suit provision exists for abatement purposes).

cumstances—pollutants continue to reach the Savannah River watershed—therefore making Kinder Morgan’s violation appropriate for citizen enforcement.⁹⁴

The Fourth Circuit’s finding in *Upstate Forever II* that a discharge that passes through groundwater may still result in a CWA violation is also firmly rooted in statutory language and precedent from other circuits.⁹⁵ The court correctly noted that the CWA only requires that pollution comes “from” a point source and contains no language on whether that point source must directly feed into the navigable waterway.⁹⁶ The court’s finding that the pollution does not need to be *directly* added from the point source to the body of water is also supported by the Supreme Court’s 2006 decision in *Rapanos v. United States*, where a plurality of justices emphasized that the CWA merely forbids the addition of pollutants to navigable waters, with no reference to directness.⁹⁷ Although the United States Court of Appeals for the Sixth Circuit reached an opposite conclusion in two cases handed down after the Fourth Circuit’s *Upstate Forever II* decision, the Fourth Circuit’s position aligns with precedent from all other circuits to have ruled on the issue.⁹⁸ The

⁹⁴ See *Upstate Forever II*, 887 F.3d at 648 (noting that the need for abatement “continues so long as the contaminant continues to flow into navigable waters,” as is the case with the petroleum products discharged from Kinder Morgan’s pipeline).

⁹⁵ See 33 U.S.C. § 1362(12)(A) (requiring that a discharge come “from” a point source); *Upstate Forever II*, 887 F.3d at 652 (finding discharges that reach navigable water by way of hydrologically connected groundwater are within the CWA’s scope); *Haw. Wildlife Fund*, 886 F.3d at 752 (finding a CWA violation when pollutants traveled through groundwater in their movement from injection wells—the point source—to the Pacific Ocean—the navigable water); *Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 510–11 (2d Cir. 2005) (noting that it would be illogical to require both the cause of a pollution and intervening land to qualify as a point source); *Concerned Area Residents for the Env’t*, 34 F.3d at 119 (holding that a CWA violation could be found when liquid manure passed through fields into navigable waters).

⁹⁶ See 33 U.S.C. § 1362(12)(A) (containing no language on the directness of a discharge from a point source to navigable waters).

⁹⁷ See *Rapanos v. United States*, 547 U.S. 715, 743 (2006) (finding that the CWA “does not forbid the ‘addition of any pollutant *directly* to navigable waters from any point source,’ but rather the ‘addition of any pollutant *to* navigable waters”); *Upstate Forever II*, 887 F.3d at 651 (finding that a point source discharge may pass through groundwaters before reaching navigable waters). The Court in *Rapanos* noted without disapproval that lower courts had specifically held that unpermitted discharges that pass-through conveyances rather than directly into navigable waters could constitute CWA violations. 547 U.S. at 743; *United States v. Velsicol Chem. Corp.*, 438 F. Supp. 945, 946–947 (W.D. Tenn. 1976) (rejecting defendant’s argument that a discharge did not violate the CWA because it traveled through a municipal treatment system rather than directly entering a navigable waterway).

⁹⁸ Compare *Upstate Forever II*, 887 F.3d at 652 (finding discharges that reach navigable water by way of hydrologically connected groundwater are within the CWA’s scope), *Haw. Wildlife Fund*, 886 F.3d at 752 (finding a CWA violation when pollutants traveled through groundwater in their movement from injection wells—the point source—to the Pacific Ocean—the navigable water), and *Waterkeeper All., Inc.*, 399 F.3d at 510–11 (noting that it would be illogical to require both the cause of a pollution and intervening land to qualify as a point source), with *Ky. Waterways All.*, 905 F.3d at 931, 933 (finding the CWA inapplicable to a coal ash discharge that

Fourth Circuit's ruling is further supported by the EPA's own interpretation of its authority.⁹⁹ Although the court did not grant *Chevron* deference to the EPA's interpretation, it did give "respectful consideration" to the EPA's prior use of the hydrological connection theory.¹⁰⁰

The Fourth Circuit's decision is further bolstered by the CWA's broad purpose and the important policy of holding polluters accountable.¹⁰¹ As the court properly noted, the finding of liability for an indirect discharge prevents the opening of an undesirable regulatory loophole that would restrict the ability of citizen groups and government agencies to hold polluters accountable.¹⁰² Such a loophole would substantively limit the ability of the

traveled from a holding pond, through groundwater, into a nearby lake), and *Tenn. Clean Water Network*, 905 F.3d at 447 (finding the CWA inapplicable to a coal ash discharge that traveled through groundwater to a nearby river).

⁹⁹ See CAFO Standards, 66 Fed. Reg. at 3015 (indicating that the CWA applies to discharges "from a point source via ground water that has a direct hydrologic connection to surface water"); Amendment to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,892 (Dec. 12, 1991) (to be codified at 40 C.F.R. pt. 131) (indicating that NPDES permits are required for discharges to hydrologically connected groundwater). *But see* Revised Definition of "Waters of the United States," 84 Fed. Reg. 4154, 4184 (Feb. 14, 2019) (to be codified at 33 C.F.R. pt. 328 and in scattered parts of 40 C.F.R.) (proposing to exclude discharges to wetlands from CWA jurisdiction unless there is a "direct hydrologic surface connection" rather than permitting a hydrologic connection that includes groundwater).

¹⁰⁰ See *Upstate Forever II*, 887 F.3d at 651 (finding that the EPA's analysis of its own authority requires consideration due to the highly technical requirements of the CWA); *see also* *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (finding that "considerable weight" must be given to administrative interpretations of statutes under the administering agency's purview). The EPA filed an amicus brief in support of the plaintiffs in the *Hawai'i Wildlife Fund* litigation arguing that the agency had historically regulated discharges to hydrologically connected groundwater under the CWA and that the CWA therefore remained applicable to the plaintiff's allegations. Brief of the United States as Amicus Curiae in Support of Plaintiffs-Appellees at 12, *Haw. Wildlife Fund*, 886 F.3d 737 (No. 15-17447), 2016 WL 3098501, at *12.

¹⁰¹ See 33 U.S.C. § 1251 (making it a "national goal" to eliminate all discharges of pollutants from navigable waters); William L. Andreen, *Water Quality Today—Has the Clean Water Act Been a Success?*, 55 ALA. L. REV. 537, 562 (2004) (noting that the CWA's pollution permitting program is centered on its wide-ranging prohibition on the discharge of any pollutant to navigable waters from a point source). Congress also broadly defined a key statutory term—navigable waters—as "waters of the United States." 33 U.S.C. § 1362(7); *see* H.R. REP. NO. 92-911, at 131 (1972) ("The Committee fully intends the term 'navigable waters' to be given the broadest possible constitutional interpretation.").

¹⁰² See *Upstate Forever II*, 887 F.3d at 652 (expressing concern that a finding of no liability would undermine the CWA by enabling polluters to evade liability through discharging into the ground); *Haw. Wildlife Fund*, 881 F.3d at 767 (determining that a conclusion of no-liability would result in the creation of a categorical exemption for wastewater injection wells, contrary to the CWA's language and intent); *N. Cal. River Watch v. Mercer Fraser Co.*, No. C-04-4620 SC, 2005 WL 2122052, at *2 (N.D. Cal. Sept. 1, 2005) (finding it illogical for the CWA to regulate discharges from a polluter whose pipe runs directly from a factory to a riverbank but not the polluter who stores the pollutants in a leaky basin that allows the chemicals to seep into the river). *But see* Patricia Barmeyer, *Does Upstate Forever Mean Potential Citizen Suit Liability Forever?*, AM. COLL. OF ENVTL. LAWYERS BLOG (May 24, 2018), <http://www.aacol.org/post/2018/05/24/Does-Upstate-Forever-Mean-Potential-Citizen-Suit-Liability-Forever.aspx> [<https://perma.cc/6QW5-J678>] (arguing

EPA and individual citizens or citizen groups to effectuate the CWA's purpose of restoring water quality.¹⁰³ The Sixth Circuit has suggested that other environmental statutes such as the Resource Conservation and Recovery Act ("RCRA") may be better suited to hold parties accountable for certain groundwater discharges.¹⁰⁴ RCRA, however, is meant to cover the improper storage of chemicals, not the release of pollutants into surface water—an area clearly under the purview of the CWA.¹⁰⁵ Although the Fourth Circuit's decision may result in greater liability for potential polluters, its expansive interpretation of the CWA should be welcome.¹⁰⁶ More than 30 years have passed since the CWA's stated deadline of ending pollution discharges, and water pollution remains a significant problem.¹⁰⁷ This decision will therefore help move water quality in the right direction.¹⁰⁸

that the potential for citizen-suit liability has significantly increased after the *Upstate Forever II* decision); *CWA Liability Expanded to Include Migrating Groundwater Contamination with a "Direct Hydrologic Connection" to Jurisdictional Surface Waters*, HINSHAW & CULBERTSON INFORMING ILL. NEWSL. (July 10, 2018), <https://www.hinshawlaw.com/newsroom-newsletters-309.html> [<https://perma.cc/7MAQ-8MFC>] (arguing that the *Upstate Forever II* decision significantly expanded CWA liability and will result in increased litigation).

¹⁰³ See *Ky. Waterways All.*, 905 F.3d at 941 (Clay, J., concurring in part and dissenting in part) (contending that the majority opinion has created an exception with no limits that would give polluters free rein to add contaminants to navigable waterways, so long as they traveled through any medium on their way to the navigable waterway). Specifically, Judge Clay suggests that the holding will enable polluters to simply "discharge pollutants from a sprinkler system suspended above Lake Michigan" without liability. *Id.* at 942.

¹⁰⁴ Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901–6992 (2012); see *Ky. Waterways All.*, 905 F.3d at 937–38 (noting that the discharged coal ash deposits are regulated by RCRA and finding the CWA inapplicable). *But see Ky. Waterways All.*, 905 F.3d at 945 (Clay, J., concurring in part and dissenting in part) (arguing that the CWA and RCRA are not mutually exclusive but can both be applicable to an improper discharge).

¹⁰⁵ See Smith, *supra* note 3, at 386, 399 (noting that significantly fewer citizen suits are filed annually under RCRA than under the CWA). Compare 33 U.S.C. § 1251(a) (making it a national policy to restore the nation's waters to their natural state through the elimination of discharges), with 42 U.S.C. § 6902(a) (making it a national policy to reduce and eliminate the generation of hazardous waste and to improve the storage and disposal of such waste). RCRA regulations exclude many materials from the statute's purview, which may limit the number of suits filed. See 40 C.F.R. § 261.4 (2018) (listing RCRA exclusions including domestic sewage, pulping liquors, certain petroleum-refining materials, among others).

¹⁰⁶ See *Upstate Forever II*, 887 F.3d at 652 (finding CWA liability for pollutants that travel indirectly from point sources to navigable water through hydrologically connected groundwater).

¹⁰⁷ Michael Hawthorne, *Chicago River Still Teems with Bacteria Flushed from Sewers After Storms*, CHI. TRIB. (June 23, 2017), <https://www.chicagotribune.com/news/local/breaking/ct-chicago-river-still-dirty-met-20170623-story.html> [<https://perma.cc/5RK4-94C9>] (noting that the Chicago River continues to receive liquid waste during storm events); Lynton S. Land, *We Can't Improve the Bay's Water Quality Without Addressing Manure*, BAY J. (Sept. 25, 2018), https://www.bayjournal.com/article/we_cant_improve_the_bays_water_quality_without_addressing_manure [<https://perma.cc/3PB3-TRTD>] (stating that the water quality of the Chesapeake Bay as not made significant improvements since the CWA's enactment); Jack Shea, *Action Urged on Sewage Spills into Merrimack River*, DAILY NEWS OF NEWBURYPORT (Oct. 20, 2018), https://www.newburyportnews.com/news/local_news/action-urged-on-sewage-spills-into-merrimack-river/article_a323b9c7-

CONCLUSION

The Fourth Circuit's decision in *Upstate Forever v. Kinder Morgan Energy Partners, L.P.* created a broad standard for unpermitted point source discharge liability under CWA. The CWA was enacted with the broad purpose of improving and restoring the integrity of the nation's waters, and the court's decision substantively adhered to this objective. Through its finding that the point sources themselves do not need to continue to discharge pollutants, and its determination that liability can be found for pollution discharges that travel through groundwater, the Fourth Circuit avoided the creation of an unnecessary and unwelcome regulatory loophole. Although the court's ruling will enhance the ability of private individuals, citizen groups, and government actors to hold polluters accountable, the reach of these enforcement opportunities may be limited, given the Sixth Circuit's recent contradictory holdings and the Supreme Court's decision to grant certiorari in the related *Hawai'i Wildlife Fund* case.

JUSTIN RHEINGOLD

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9890-50db-ace6-e4d50efd7abb.html [<https://perma.cc/5EAD-EJUK>] (discussing ongoing sewage spills into the Merrimack River in Massachusetts).

¹⁰⁸ See *Upstate Forever II*, 887 F.3d at 652 (holding a pipeline operator liable for spilled petroleum products that made their way through the groundwater and into a navigable waterway).