

UPSTATE FOREVER V. KINDER MORGAN:
NAVIGATING THE INTERPRETATION OF
“DISCHARGE OF POLLUTANT” TO THE SUPREME
COURT

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I. INTRODUCTION

The purpose of the Clean Water Act (CWA) is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”¹ The CWA protects the Nation’s waters by utilizing a complex statutory scheme with multiple enforcement provisions, including authorizing citizens to file suit against persons alleged to be violating the CWA.² A violation of the CWA requires a “discharge of pollutant” from a “point source” without a permit and such violation must be “continuous or intermittent” for the citizen-suit provision to apply.³ However, not all Federal courts have interpreted this provision of the CWA in the same way.

For example, in *Upstate Forever v. Kinder Morgan (Upstate)*, the United States Court of Appeals for the Fourth Circuit considered whether a discharge of

1. 33 U.S.C. § 1251(a) (1973).

2. 33 U.S.C. § 1365(a)(1) (2018).

3. 33 U.S.C. § 1365(f); 33 U.S.C. § 1311(a) (1973); 33 U.S.C. § 1362(12), (14) (2019); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49 (1987).

a pollutant without a permit from a point source into groundwater that subsequently migrates to navigable waters is a violation of the CWA. The Fourth Circuit also considered whether an ongoing violation of the CWA is present when a point source no longer discharges pollutants but pollutants previously discharged migrate to navigable waters.⁴ The plaintiffs in *Upstate* filed a citizen-suit alleging the defendants discharged pollutants into navigable waters without a permit in violation of the CWA.⁵ The plaintiffs alleged that while the point source discharging the pollutant “had been repaired and no longer was discharging pollutants,” the pollutants travelled through groundwater and were currently contaminating navigable waters.⁶ Thus, the plaintiffs alleged an ongoing violation of the CWA was present.⁷

The district court ruled for the defendants on the grounds that the plaintiffs had failed to state a claim upon which relief could be granted and lack of subject matter jurisdiction.⁸ In first reaching the decision to grant plaintiffs’ motion to dismiss, the district court reasoned the plaintiffs failed to state a claim because the quickly-repaired pipeline “no longer was discharging pollutants ‘directly’ into navigable waters,” and therefore violation of the CWA was not at issue.⁹ Second, in determining whether the court had subject matter jurisdiction, the district court explained it lacked jurisdiction because the CWA does not govern the discharges to groundwater that may eventually add pollutants to navigable waters.¹⁰

After the district court ruled for the defendants, the Fourth Circuit Court of Appeals vacated and remanded in favor of the plaintiffs.¹¹ The court observed that although the defendant had repaired the pipeline discharging the pollutants, the pollutants originating from the pipeline continued to seep into navigable waters, albeit indirectly through groundwater and that a pollutants’ indirect path to navigable waters is covered under the CWA.¹² The court held that, unless permitted, those pollutants that move through groundwater before migrating to navigable water represents a violation of the CWA where there is a clear, direct hydrological connection between groundwater and navigable waters.¹³ Thus, the court observed that “a discharge of a pollutant does not require travelling” directly from a point source into navigable waters to constitute a CWA violation.¹⁴

But there was disagreement with this interpretation. Writing for the dissent, Judge Floyd asserted that since the discharge was wholly past, no ongoing violation of the CWA existed since “an ongoing violation requires that the point

4. *Upstate Forever v. Kinder Morgan*, 887 F.3d 637, 646 (4th Cir. 2018).

5. *Id.* at 638.

6. *Id.* at 645.

7. *Id.* at 641-42.

8. *Upstate Forever*, 887 F.3d at 641.

9. *Id.* at 645.

10. *Id.*

11. *Id.* at 641.

12. *Id.* at 648.

13. *Upstate Forever*, 887 F.3d at 649, 651.

14. *Id.* at 650-51.

source continually discharge [] pollutant[s]” directly into navigable waters.¹⁵ Additionally, the dissent cautioned that the facts represent an “ongoing migration” case and do not constitute an ongoing violation of the CWA.¹⁶

These diverging opinions within just one Circuit represent the various opinions of other federal circuit courts as well.¹⁷ In part because of the lack of uniformity among federal courts regarding the interpretation of “discharge of pollutant” in the context of the CWA, the Supreme Court recently granted a writ of *certiorari* in a decision similar to *Upstate* from the Ninth Circuit to consider whether pollutants discharged from a point source but migrate to navigable waters via a nonpoint source, such as groundwater, is a violation of the CWA.¹⁸

II. BACKGROUND

A. Fossil Fuel Transport in the United States

The United States is home to the largest system of energy pipelines in the world.¹⁹ Approximately 2.5 million miles of pipelines stretched across the United States as of 2017.²⁰ While some underground pipelines are only a few miles long, some span more than 1,000 miles, extending across the United States, Canada, and Mexico.²¹

Pipeline proliferation in the United States is because the country relies on fossil fuels as its primary source of energy.²² Among the 2.5 million miles of pipelines, approximately 1.3 million miles were used for refined products distri-

15. *Id.* at 662.

16. *Id.* at 660.

17. *See Connecticut Coastal Fishermen’s Ass’n. v. Remington Arms Co.*, 989 F.2d 1305, 1312 (2d Cir. 1993) (holding that the plaintiff failed to allege an ongoing violation because Remington ceased operations and discharges before the suit was filed); *Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392, 397 (5th Cir. 1985) (holding that plaintiff’s allegation that residual effects of a discharge threaten groundwater is not a violation of the CWA); *County of Maui v. Hawai’i Wildlife Fund*, 881 F.3d 754 (9th Cir. 2018) (holding a discharge of pollutants from a point source that travels through groundwater without a permit violates the CWA); *Kentucky Waterways All. v. Ky. Util’s Co.*, 905 F.3d 925 (6th Cir. 2018).

18. *See generally* *County of Maui v. Hawai’i Wildlife Fund*, 881 F.3d 754 (9th Cir. 2018); *Order Granting Petition for Writ of Certiorari, County of Maui v. Hawai’i Wildlife Fund*, 881 F.3d 754 (9th Cir. 2018), 139 S. Ct. 1164 (2019), No. 18-260. *See also* Brief for United States as Amici Curiae Supporting Petitioners, at 1, *County of Maui v. Hawai’i Wildlife Fund*, 881 F.3d 754 (9th Cir. 2018), No. 18-260, *Kinder Morgan Energy Partners, L.P., et. al. v. Upstate Forever, et. al.*, 887 F.3d 637 (4th Cir. 2018), No. 18-268 (requesting *cert.* to review issue presented by cases in both circuits). The Supreme Court has received a petition for writ of *certiorari* in *Upstate*, but has not decided whether to review that case. SCOTUSBLOG, *KINDER MORGAN ENERGY PARTNERS, L.P. v. UPSTATE FOREVER*, <http://www.scotusblog.com/case-files/cases/kinder-morgan-energy-partners-l-p-v-upstate-forever/> (last visited Sept. 25, 2019).

19. PIPELINE 101, WHY DO WE NEED PIPELINES?, <http://www.pipeline101.org/Why-Do-We-Need-Pipelines>.

20. PIPELINE 101, WHERE ARE LIQUID PIPELINES LOCATED? (2013), <http://www.pipeline101.org/Where-Are-Pipelines-Located>.

21. *Id.*

22. U.S. ENERGY INFORMATION ADMINISTRATION, FREQUENTLY ASKED QUESTIONS: WHAT IS U.S. ELECTRICITY GENERATION BY SOURCE?, <https://www.eia.gov/tools/faqs/faq.php?id=427&t=6>.

bution in 2017.²³ Fossil fuels often travel vast distances and require processing or refining before becoming the finished product that reaches the end user.²⁴ At these refining facilities, the extracted petroleum is refined into petroleum products such as gasoline.²⁵ The refined petroleum product is then distributed to the public, typically via pipeline.²⁶

During the transport of refined petroleum products, safety and environmental issues can emerge.²⁷ While the rate of failure for pipeline transportation is lowest among the various transportation methods for refined products, pipelines may leak, dispersing hazardous materials into the soil and bodies of water.²⁸ Such leaks can contaminate our sources of food and water, while also negatively affecting the wildlife in the contaminated area, and are costly to mitigate and contain.²⁹ Congress attempted to address the problems by passing the CWA, a federal law that governs water pollution control and enforcement. However, the CWA has been the source of much litigation and the federal judiciary has inconsistently interpreted the law's provisions.³⁰

B. *The Clean Water Act*

Large-scale regulation of water pollution in the United States began in 1948 with the Federal Water Pollution Control Act.³¹ Ultimately, the Act's ineffectiveness led to broad amendments in 1972, creating what is now known as the Clean Water Act.³² The stated purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."³³ The CWA limits the discharge of pollutants into "navigable waters" by establishing that "the discharge of any pollutant by any person shall be unlawful."³⁴

However, there are exceptions, as a polluter may obtain a permit to conduct activities "which may result in any discharge into the navigable waters."³⁵ These permits are issued in accordance with the National Pollutant Discharge Elimina-

23. PHMSA, TOTAL MILES OF GAS DISTRIBUTION DIFFERS BETWEEN MAIN GASOLINE DISTRIBUTION PIPELINES AND SERVICE GASOLINE DISTRIBUTION PIPELINES, <https://hip.phmsa.dot.gov/analyticsSOAP/saw.dll?Portalpages>.

24. PIPELINE 101, *supra* note 19.

25. *Id.*

26. PIPELINE 101, HOW DO PIPELINES WORK?, <http://www.pipeline101.org/How-Do-Pipelines-Work> (last visited Nov. 15, 2018).

27. PIPELINE 101, ARE PIPELINES SAFE?, <http://www.pipeline101.org/Are-Pipelines-Safe> (last visited Nov. 15, 2018).

28. Chiara Belvederesi, et al., *Statistical analysis of environmental consequences of hazardous liquid pipeline accidents*, 4 HELIYON (Nov. 7, 2018).

29. *Id.*

30. *Id.*

31. EPA.GOV, HISTORY OF THE CLEAN WATER ACT, <https://www.epa.gov/laws-regulations/history-clean-water-act>.

32. *Id.*

33. 33 U.S.C. § 1251(a).

34. 33 U.S.C. § 1311(a).

35. 33 U.S.C. § 1341(a).

tion System (NPDES), and may be issued by the Environmental Protection Agency (EPA) or a state environmental control agency.³⁶ According to the EPA, the permit contains limits on what a company “can discharge, monitoring and reporting requirements, and other provisions to ensure that the discharge does not hurt water quality or people’s health. In essence, the permit translates general requirements of the Clean Water Act into specific provisions tailored to the operations of each person discharging pollutants.”³⁷ The EPA authorizes state, tribal, and territorial governments to permit and enforce the NPDES program but ultimately retains oversight.³⁸

The NPDES permits are aimed to control the discharge of pollutants utilizing both “technology-based limits and water-quality limits.”³⁹ These permits generally license “a facility to discharge a specified amount of pollutant into a receiving water under certain conditions.”⁴⁰ Furthermore, NPDES permits are required for point source pollution, but not for nonpoint source pollution.⁴¹ The permits are issued in two forms: individual permits and general permits.⁴² Individual permits are specifically crafted to individual facilities and are modified based on the facility’s application.⁴³ Permits are granted based on the facility’s type of activity, the nature of the discharge, and the quality of the receiving water.⁴⁴ Additionally, individual permits are limited to a five-year time period.⁴⁵ Conversely, a general permit “covers a group of dischargers with similar qualities within a given geographical location.”⁴⁶ According to the EPA, general permits are a cost-effective permitting option for state agencies.⁴⁷

Under the CWA, Congress provides that both government agencies and citizens may bring suit for a violation under the Act.⁴⁸ The CWA states, “any citizen may commence civil action on his own behalf . . . against any person . . . who is alleged to be in violation of an effluent standard or limitation under [the CWA].”⁴⁹ Congress defines an “effluent standard or limitation” under the CWA to include the “discharge of any pollutant” without a permit.⁵⁰ The CWA also defines “discharge of a pollutant” as “any addition of any pollutant to navigable

36. 33 U.S.C. § 1311(a); 33 U.S.C. § 1342 (2019).

37. EPA.GOV, NPDES PERMIT BASICS, <https://www.epa.gov/npdes/npdes-permit-basics> (last visited Sept. 3, 2019) [hereinafter NPDES BASICS].

38. EPA.GOV, ABOUT NPDES, <https://www.epa.gov/npdes/about-npdes> (last visited Sept. 3, 2019) [hereinafter ABOUT NPDES].

39. *Id.*

40. *Id.*

41. NPDES BASICS, *supra* note 37.

42. ABOUT NPDES, *supra* note 38.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. ABOUT NPDES, *supra* note 38.

48. 33 U.S.C. § 1365; 33 U.S.C. 1319 (2019).

49. 33 U.S.C. § 1365(a)(1).

50. 33 U.S.C. § 1365(f); 33 U.S.C. § 1311(a).

waters from any point source.”⁵¹ The term “point source” is defined in the CWA as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well . . . from which pollutants are or may be discharged.”⁵² Additionally, Congress defines the term “navigable waters” as “waters of the United States.”⁵³ The Army Corps of Engineers, which may also regulate pollution and issue permits, does not limit the interpretation of “waters of the United States” to only mean those waters traditionally navigable, but also “interstate waters, including interstate wetlands . . . tributaries . . . [and] [a]ll waters adjacent” to such waters.⁵⁴

C. Case Overview: Do Indirect Discharges to the Waters of the United States Through Groundwater Require a CWA Permit?

In 2014, approximately 370,000 gallons of gasoline allegedly spilled from an underground pipeline owned by Kinder Morgan Energy Partners LP (Kinder Morgan) and its subsidiaries in South Carolina.⁵⁵ The pipeline broke about six to eight feet underground, where gasoline and other contaminants seeped into the soil and groundwater.⁵⁶ The pipeline broke less than 1,000 feet from two down gradient creeks and their adjacent wetlands.⁵⁷ In late 2014, residents of Anderson County, South Carolina discovered dead plants, odors, and pools of gasoline near the pipeline break.⁵⁸ Hazardous contaminants had been detected on several occasions through 2017 near the spill site and at least one of the nearby down gradient creeks.⁵⁹ Kinder Morgan repaired the ruptured pipeline and implemented clean up and recovery measures in accordance with the South Carolina Department of Health and Environmental Control, but by the end of 2015 at least 160,000 gallons remained unrecovered.⁶⁰ Additionally, Kinder Morgan did not acquire an NPDES permit authorizing the discharge of pollutants.⁶¹

In 2016, Upstate Forever and the Savannah Riverkeeper (Upstate Forever), local environmental conservation organizations, filed suit against Kinder Morgan alleging a violation of the CWA.⁶² Upstate Forever alleged in its complaint that the ruptured pipeline “caused a discharge that has polluted, and continues to pollute, navigable waters by seeping from a point source . . . through soil and groundwater to nearby tributaries and wetlands.”⁶³ Thus, the complaint alleged

51. 33 U.S.C. § 1362(12)(A).
52. 33 U.S.C. § 1362(14).
53. 33 U.S.C. § 1362(7).
54. 33 C.F.R. § 328.3(a)(1)-(3), (5-6) (2018).
55. *Upstate Forever*, 887 F.3d at 643.
56. *Id.* at 643.
57. *Id.*
58. *Id.*
59. *Id.* at 644.
60. *Upstate Forever*, 887 F.3d at 644.
61. *Id.*
62. *Id.*
63. *Id.*

two violations of the CWA.⁶⁴ First, that Kinder Morgan discharged pollutants from a point source to navigable waters without a permit.⁶⁵ Secondly, that the discharge of pollutants caused by Kinder Morgan continues to seep through groundwater through a "direct hydrological connection" to navigable waters.⁶⁶ Upstate Forever also alleged that the remediation efforts undertaken by Kinder Morgan had been insufficient and sought damages, declaratory relief, and injunctive relief against Kinder Morgan.⁶⁷

Kinder Morgan moved to dismiss the complaint claiming that the district court lacked subject matter jurisdiction and that Upstate Forever failed to state a claim for relief.⁶⁸ The district court granted the motion on both grounds. It held that it lacked subject matter jurisdiction because "the CWA did not encompass the movement of pollutants through groundwater that is hydrologically connected to navigable waters."⁶⁹ The district court also held that Upstate Forever failed to state a claim for relief because "the pipeline had been repaired and no longer was discharging pollutants 'directly' into navigable waters."⁷⁰ Upstate Forever subsequently appealed to the Fourth Circuit of the United States.⁷¹

III. ANALYSIS

The Fourth Circuit issued three key holdings that could have lasting impacts on the industries dealing with point sources of pollution.⁷² The first holding, attracting much of the debate between the majority and dissent in *Upstate*, decided that in order to state a claim under the CWA, a plaintiff need only allege an ongoing addition of pollutants to navigable waters and does not require the point source to continue the discharge of pollutants.⁷³ The second holding, however, was a matter of first impression for the court and specified that a discharge of a pollutant need not be directly discharged from a point source into navigable waters to constitute a violation of the CWA.⁷⁴ This conclusion would become the court's most controversial holding, gaining attention from the Supreme Court.⁷⁵ A third notable holding follows from the second holding and specifies that a discharge need not be direct from a point source into navigable waters, but a direct hydrological connection must exist between the groundwater and the navigable water.⁷⁶ These three holdings, separately and in conjunction with one another,

64. *Id.* at 644-45.

65. *Upstate Forever*, 887 F.3d at 644.

66. *Id.* at 644-45.

67. *Id.* at 645.

68. *Id.*

69. *Id.*

70. *Upstate Forever*, 887 F.3d at 644.

71. *Id.* at 645.

72. *Id.* at 647-51.

73. *Id.* at 649.

74. *Id.* at 649-51.

75. SCOTUSBLOG, *supra* note 18.

76. *Upstate Forever*, 887 F.3d at 651.

potentially expand the realm of violations that may be subject to the citizen-suit provision of the CWA.⁷⁷

A. The CWA Citizen-Suit Provision Does Not Require a Point Source to Continue to Discharge the Pollutant

In *Upstate*, the majority found that the primary issue to be resolved was “whether an indirect discharge of a pollutant through groundwater, which has a direct hydrological connection to navigable waters, can support a theory of liability under the CWA.”⁷⁸ However, the court noted that as a threshold issue, it must have jurisdiction under the CWA to hear the claim.⁷⁹ In doing so, the court noted that jurisdiction over citizen-suits under the CWA requires an allegation of an ongoing violation.⁸⁰ Therefore, the preliminary issue was whether the plaintiffs alleged an ongoing violation.⁸¹

Both the majority and dissent recognized that for a violation to be ongoing it must be either “continuous” or “intermittent.”⁸² Furthermore, as the court previously recognized, a violation of the CWA that is considered “wholly past” will not be subject to the jurisdiction of federal courts under the citizen-suit provision of the CWA.⁸³

The majority relied on its decision in *Goldfarb v. Mayor of Baltimore (Goldfarb)*, where the City of Baltimore was alleged to have stored hazardous materials that leaked from a storage point and migrated through the soil in violation of the CWA.⁸⁴ The reasoning from *Goldfarb* in which an ongoing violation was found to be present, and which the majority applied, is that “although a defendant’s conduct that is causing a violation may have ceased in the past . . . what is relevant is that the violation is continuous or ongoing.”⁸⁵ Additionally, the majority observed, “the CWA’s language does not require that the point source continue to release a pollutant for a violation to be ongoing.”⁸⁶ From this, the court in *Upstate* reasoned that there need only be an ongoing addition to navigable waters regardless of whether the conduct causing a violation is ongoing in order to allege a violation of the CWA.⁸⁷ Finally, the court declared “the fact

77. See generally *id.*

78. *Id.* at 646.

79. *Id.* at 646.

80. *Id.* at 646 (citing *Gwaltney*, 484 U.S. at 64).

81. *Upstate Forever*, 887 F.3d at 646.

82. *Id.* at 646, 658-59 (citing *Gwaltney*, 484 U.S. at 57).

83. *Id.* at 646, 658-59. See also Joel A. Wiate, *The Continuing Questions Regarding Citizen Suits Under the Clean Water Act: Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 46 WASH. & LEE L. REV. 313, 315-18 (1989) (noting that debate often arises as to what is a “continuous” violation or one that is “wholly past”).

84. *Upstate Forever*, 887 F.3d at 647; *Goldfarb v. Mayor of Baltimore*, 791 F.3d 500, 513 (4th Cir. 2015).

85. *Upstate Forever*, 887 F.3d at 647; *Goldfarb*, 791 F.3d at 513.

86. *Upstate Forever*, 887 F.3d at 648.

87. *Upstate Forever*, 887 F.3d at 648; 33 U.S.C. § 1362(12)(A).

that a ruptured pipeline has been repaired, of itself, does not render the CWA violation wholly past."⁸⁸

The dissent in *Upstate* differs from the majority in its interpretation of the CWA and what constitutes an ongoing discharge of pollutants.⁸⁹ In the view of the dissent, there is no ongoing violation of the CWA because "there is no ongoing discharge of pollutants from a point source."⁹⁰ The dissent's reasoning for such a conclusion is that the only point source at issue, the pipeline owned by Kinder Morgan, is not presently discharging pollutants.⁹¹ The dissent argues the facts present an "ongoing migration case" in which courts have previously dismissed similar claims because the discharge from the point source had ceased.⁹² In the dissent's opinion, an ongoing CWA violation requires that "the point source's discharging, adding, conveying, transporting, or introducing of pollutants must be continuous."⁹³ Given an ongoing CWA violation is "any addition of pollutants . . . from any point source," the dissent concluded that there cannot be an ongoing violation if there is not an ongoing discharge from a point source, which was not present.⁹⁴ In sum, the issue turns on the proper interpretation of an "ongoing discharge of pollutants from a point source" as is required for the CWA's citizen suit provision.⁹⁵

In reaching its conclusion that an ongoing violation need only be an ongoing addition of pollutants to navigable waters, the majority also attempts to distinguish the facts in *Upstate* from other circuits that reached different conclusions.⁹⁶ First, the majority distinguished the facts in *Upstate* from a Fifth Circuit case, *Hamker v. Diamond Shamrock Chemical Co. (Hamker)*, where the plaintiffs alleged a discharge of pollutants into groundwater from a pipe.⁹⁷ The majority found that the pollutants in *Hamker* were not discharged into navigable waters and the case was therefore distinguishable.⁹⁸ However, as the dissent noted, the decision in *Hamker* did not turn on the fact the plaintiff did not allege a discharge into navigable waters, but that "the continuing addition of pollutants did not come from any point source."⁹⁹ And the majority responded in a footnote that, "to the extent that *Hamker's* reasoning suggests that an ongoing violation requires that the point source continually discharge a pollutant, *Hamker* contravenes our decision in *Goldfarb*."¹⁰⁰

88. *Upstate Forever*, 887 F.3d at 648.

89. *Id.* at 659.

90. *Id.*

91. *Id.* at 660.

92. *Id.* at 660.

93. *Upstate Forever*, 887 F.3d at 660.

94. *Id.* at 659.

95. *Id.* at 659.

96. *Id.* at 649; *Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392 (5th Cir. 1985).

97. *Upstate Forever*, 887 F.3d at 649; *Hamker*, 756 F.2d at 397.

98. *Upstate Forever*, 887 F.3d at 649; *Hamker*, 756 F.2d at 397.

99. *Upstate Forever*, 887 F.3d at 661-62; *Hamker*, 756 F.2d at 397.

100. *Upstate Forever*, 887 F.3d at 662.

The language in *Goldfarb* relied upon by the majority in *Upstate* states, “although a defendant’s conduct that is causing a violation may have ceased in the past . . . what is relevant is that the violation is continuous or ongoing.”¹⁰¹ As the dissent observed, this language presumes an already ongoing violation and does not help establish whether there is an ongoing violation in the present case.¹⁰² It is undisputed that a violation may have occurred in the past when the point source was actually discharging the pollutants, but because the point source itself is no longer discharging pollutants, it is questionable that an ongoing violation exists.¹⁰³ This observation leads to the implication, noted by the dissent in *Upstate*, that the majority’s reliance on *Goldfarb* is perhaps misplaced and thus *Upstate* could have resulted in a different conclusion.¹⁰⁴

B. A Discharge of Pollutants that Moves Through Groundwater to Navigable Waters Constitutes a Discharge of Pollutants Under the CWA

As a matter of first impression at the Fourth Circuit, the court addressed whether a discharge of pollutants from a point source to groundwater that ultimately reaches navigable waters constitutes a discharge of pollutants under the CWA.¹⁰⁵ The majority began its opinion by observing that a discharge of a pollutant “need not be a discharge ‘directly’ to a navigable water from a point source.”¹⁰⁶ This observation stems from Justice Scalia’s plurality opinion in *Rapanos*, where he noted that the CWA prohibits the “addition of any pollutant to navigable waters.”¹⁰⁷ Because not all wetlands and streams are navigable waters under the CWA,¹⁰⁸ “federal courts consistently have held that a discharge of a pollutant ‘that naturally washes downstream likely violates [the CWA].’”¹⁰⁹

As noted by the majority in *Upstate*, a discharge of a pollutant need not be a discharge “directly” to a navigable water to constitute a violation of the CWA.¹¹⁰ The majority also asserts a discharge need not “directly” come from the point source.¹¹¹ Consequently, when interpreting the plain meaning of the phrase “from [a] point source,” the majority explained, “a point source is the starting point or cause of a discharge under the CWA, but that starting point need not also convey the discharge directly to navigable waters.”¹¹² This interpretation leads the majority to strongly conclude that “hold[ing] otherwise effectively

101. *Id.* at 662; *Goldfarb*, 791 F.3d at 513.

102. *Upstate Forever*, 887 F.3d at 662.

103. *Id.* at 648.

104. *Id.* at 662.

105. *Id.* at 649.

106. *Id.* at 649.

107. *Upstate Forever*, 887 F.3d at 650; *Rapanos v. United States*, 547 U.S. 715, 743 (2006); 33 U.S.C. § 1362(12)(A)).

108. *Rapanos*, 547 U.S. at 742.

109. *Upstate Forever*, 887 F.3d at 650; *Rapanos*, 547 U.S. at 743 (citing *U.S. v. Velsicol Chem. Corp.*, 438 F.Supp. 945, 946–47 (W.D. Tenn. 1976)).

110. *Upstate Forever*, 887 F.3d at 650; *Rapanos*, 547 U.S. at 743; 33 U.S.C. § 1362(12)(A).

111. *Id.*

112. *Upstate Forever*, 887 F.3d at 650.

would require that any discharge of a pollutant cognizable under the CWA be seamlessly channeled by point sources until the moment the pollutant enters navigable waters.”¹¹³ Requiring point sources to solely channel pollutants until they are discharged into navigable water to constitute a CWA violation would likely diminish the number of lawsuits brought under the citizen-suit provision because discharges are not universally “directly” from a point source into navigable water. While fewer lawsuits may be beneficial to the fossil fuel companies, such an interpretation also controverts the purpose of the CWA.¹¹⁴ Pollutants may still reach navigable waters even though they do not upon the moment of discharge, as illustrated in *Upstate*.¹¹⁵ The majority also considered the decisions of similar issues from the Second and Ninth Circuits.¹¹⁶ In both circuits, the courts rejected the concept that a violation of the CWA is only present when the point source itself directly discharges pollutants into navigable waters.¹¹⁷

The dissent disagreed with this conclusion, observing that the present case represents an “ongoing migration case.”¹¹⁸ An ongoing migration case is a situation when a discharge occurred in the past, but the pollutant migrated through groundwater to reach navigable waters.¹¹⁹ Thus, the dissent concluded, these “lasting effects” of a wholly “past violation cannot give rise to citizen suit under the CWA.”¹²⁰ The dissent reached this conclusion for two reasons.¹²¹

First, the dissent asserted that an “ongoing migration does not involve a point source,” thereby removing an essential element of the citizen-suit provision under the CWA.¹²² The dissent emphasized the “lack of a discharging activity from a point source” as the determining factor in concluding that an ongoing migration case cannot be brought under the citizen-suit provision of the CWA.¹²³ This argument is consistent with the dissent’s overall opinion that a point source not actively discharging pollutants cannot be sustained as a violation under the CWA’s citizen-suit provision.¹²⁴

Second, the dissent argues that an “ongoing migration [case] is, by definition, nonpoint source pollution, which is outside of the CWA’s reach.”¹²⁵ This argument is supported by a litany of cases that noted Congress consciously chose

113. *Id.* at 650.

114. 33 U.S.C. § 1251(a).

115. *Upstate Forever*, 887 F.3d at 641.

116. *Id.* at 650-51; *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 499-510 (2d Cir. 2005); *Hawai’i Wildlife Fund v. Cty of Maui*, 886 F.3d 762, 762-63 (2018).

117. *Upstate Forever*, 887 F.3d at 650-51.

118. *Id.* at 660.

119. *Id.*

120. *Id.* at 661.

121. *Id.* at 661-63.

122. *Upstate Forever*, 887 F.3d at 661.

123. *Id.*

124. *Id.* at 659.

125. *Id.* at 661.

not to regulate nonpoint source pollution.¹²⁶ Because Upstate Forever alleged that groundwater introduced pollutants into navigable waters, the dissent concluded that the ongoing migration of the pollutants does not amount to a CWA violation.¹²⁷

C. A Direct Hydrological Connection Must Exist Between the Groundwater and Navigable Water if the Discharged Pollutant Passes Through Groundwater

The *Upstate* court asserted that for a discharge of pollutants not directly from a point source into navigable waters to constitute a violation of the CWA, a sufficient connection between the discharge and the navigable water must be present.¹²⁸ According to the majority, a discharge through groundwater may constitute a CWA violation if there is a clear connection, or a “direct hydrological connection” between the discharge of the pollutant and the navigable waters.¹²⁹ The term “direct hydrological connection” appears to derive from the EPA’s attempt to identify a clear connection between a discharge of pollutants that travels through groundwater and navigable waters.¹³⁰ The majority adopted this language in order to determine whether a discharge of pollutants that travel through groundwater to navigable waters constitutes a CWA violation, holding that there must be a “direct hydrological connection” between the groundwater and the navigable waters.¹³¹

To illustrate, in *Upstate*, Kinder Morgan’s pipeline is approximately 1,000 feet from navigable water that was polluted and it was undisputed that such pollution originated from that pipeline.¹³² The majority articulated that the natural flow resulting in a discharge into navigable waters and the ability to trace the pollutants to the point source are decisive factors in determining whether the discharge falls under the CWA, which is present in the current case.¹³³

Perhaps the most influential observation of the majority is that if all that was required to defeat a violation of the CWA was to ensure that the discharged pollutant travelled through groundwater before reaching navigable water, the mere presence of a short distance of groundwater between the point source and navigable waters would suffice.¹³⁴ To reach this conclusion would be to rebuke

126. *Id.* at 661; *See generally* Sierra Club v. El Paso Gold Mines, 421 F.3d 1133 (10th Cir. 2005); League of Wilderness Defenders/Blue Mts. Biodiversity Project v. Forsgren, 309 F.3d 1181 (9th Cir. 2002); National Wildlife Fed’n v. Gorsuch, 693 F.2d 156 (D.C. Cir 1982); Appalachian Power Co. v. Train, 545 F.2d 1351 (4th Cir. 1976).

127. *Upstate Forever*, 887 F.3d at 661.

128. *Id.* at 651.

129. *Id.*

130. *Id.*; Proposed Rule, 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 codified at 40 C.F.R. pts. 122, 412).

131. *Upstate Forever*, 887 F.3d at 651.

132. *Id.* at 651-52.

133. *Id.* at 652; Sierra Club v. Abston Constr. Co., 620 F.2d 41, 45 (5th Cir. 1980); *Hawai’i Wildlife*, 886 F.3d at 764.

134. *Upstate Forever*, 887 F.3d at 652.

the purpose of the CWA “to restore [] the chemical, physical, and biological integrity of the Nation’s waters.”¹³⁵ While the finding of a “direct hydrological connection” may be a novel concept in the Fourth Circuit, as noted by the dissent, it is also a reasonable method to determine the “directness” and “connection” between the discharges of a pollutant from a point source that travels through groundwater and continues to navigable water.¹³⁶ If a violation of the CWA does not require a point source to directly discharge pollutants into navigable waters, but allows for discharge into groundwater that continues or migrates to navigable water, a logical test could be implemented by the Supreme Court to consistently interpret the CWA in similar cases.¹³⁷

D. Other Discharge-of-Wastewater-into-Groundwater Cases

Attempts to resolve the issue of whether the CWA prohibits a discharge of pollutants via groundwater to navigable waters has varied across circuit courts. For example, in *Hawai’i Wildlife Fund v. County of Maui (Hawai’i Wildlife)*, the Ninth Circuit similarly concluded that a pollutant discharge from a point source, in this case a well, that eventually reached navigable waters without a permit is a violation of the CWA even if it traveled through groundwater.¹³⁸ In *Hawai’i Wildlife*, the County of Maui operated multiple wells where it disposed wastewater into the groundwater that eventually reached the Pacific Ocean without a NPDES permit, leading to a lawsuit.¹³⁹ The Ninth Circuit held that the County of Maui was liable because the discharge of pollutants came from a point source, the well, and the pollutants were “fairly traceable” from the point source to a navigable water, the Pacific Ocean.¹⁴⁰

In so holding, the Ninth Circuit dismissed the argument that the discharge of pollutants from a point source into groundwater that eventually reaches navigable waters is not a violation of the CWA.¹⁴¹ The court determined that a discharge of pollutants into navigable water via groundwater is the “functional equivalent” of a discharge of pollutants into navigable waters because the pollutants can be traced back to the point source.¹⁴² Furthermore, the court rejected the theory that a point source must discharge a pollutant directly into navigable waters to constitute a CWA violation because taken to its logical conclusion, such interpretation would preclude liability in most cases.¹⁴³ Fortunately, the

135. 33 U.S.C. § 1251(a).

136. *Upstate Forever*, 887 F.3d at 662.

137. Amy Howe, *Justices take up Clean Water Act case, rebuke Texas court in death penalty case*, SCOTUSBLOG (Feb 19, 2019, 12:38 PM), <https://www.scotusblog.com/2019/02/justices-take-up-clean-water-act-case-rebuke-texas-court-in-death-penalty-case/>.

138. *Hawai’i Wildlife Fund*, 881 F.3d 754 (9th Cir. 2018).

139. *Id.* at 758-59.

140. *Id.* at 765.

141. *Id.*

142. *Id.*

143. *Hawai’i Wildlife Fund*, 881F.3d at 764.

Supreme Court has decided to resolve this issue, likely providing much needed clarity for other courts to resolve present and future cases.¹⁴⁴

Alternatively, the Sixth Circuit also decided a similar case, though it came to a different conclusion.¹⁴⁵ In *Kentucky Waterways Alliance v. Kentucky Utilities Co. (Kentucky Waterways)*, a utilities company stored leftover coal ash in ponds, which leaked pollutants into the surrounding groundwater and subsequently travelled to a nearby pond without an NPDES permit.¹⁴⁶ Eventually, the Sixth Circuit held that the utility company did not violate the CWA because discharges into groundwater are not covered by the CWA.¹⁴⁷

In reaching its holding, the court determined that groundwater was not a point source and therefore a discharge into navigable water that comes from groundwater is not a violation of the CWA.¹⁴⁸ The court recognizes that groundwater could “convey” the pollutant to navigable water, but groundwater is not “discernable,” “confined,” or “discrete” and thus cannot constitute a point source.¹⁴⁹ Additionally, the Sixth Circuit rejected the theory that a CWA violation is present when there is a direct hydrological connection between the navigable water and groundwater.¹⁵⁰ According to the court, interpreting the CWA to cover such discharges would “gut” other federal statutes and regulations while also removing authority from states to regulate such discharges.¹⁵¹

E. EPA’s Interpretative Statement

In April 2019, the EPA issued an interpretative statement regarding the Agency’s interpretation of the CWA’s NPDES permit program relating to “releases of pollutants from a point source to groundwater that subsequently migrate or are conveyed by groundwater to jurisdictional surface waters.”¹⁵² In doing so, the EPA sought to provide clarity and finality on the interpretation of the CWA specifically by determining whether an NPDES permit is required for the release of pollutants into groundwater that subsequently reaches surface water.¹⁵³ After public notice and comment, the Agency concluded “the best, if not the only, reading of the CWA” is that Congress specifically chose to exclude all releases of pollutants to groundwater from requiring NPDES permits.¹⁵⁴ The EPA further determined this exclusion also applies to releases of pollutants conveyed through

144. Application of the Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants from a Point Source to Groundwater, 84 Fed. Reg. 16,810 (2019) (to be codified at 40 C.F.R. pt. 122).

145. *Kentucky Waterways*, 905 F.3d 925.

146. *Id.* at 928.

147. *Id.*

148. *Id.* at 933.

149. *Id.*

150. *Kentucky Waterways*, 905 F.3d at 934.

151. *Id.* at 934-35.

152. 84 Fed. Reg. 16,810, at 16,810.

153. *Id.* at 16,811.

154. *Id.*

groundwater to navigable waters.¹⁵⁵ Additionally, the EPA asserts Congress structured the CWA to intentionally give states the power to regulate such groundwater releases and that Congress has also approved other federal statutes containing explicit provision regulating pollutants conveyed to groundwater.¹⁵⁶

In reaching its interpretive decision, the EPA explicitly rejected the previous theory put forth in courts necessitating a "direct hydrological connection" between groundwater and navigable waters in order to require NPDES permits.¹⁵⁷ Additionally, the EPA rejects the "terminal point source" theory that interprets the CWA to prohibit only discharges directly into navigable waters from a point source.¹⁵⁸ In deciding to reject the two interpretative theories accepted by various circuit courts, the EPA concludes that the proper interpretation is that releases to groundwater are not covered by the CWA.¹⁵⁹ Further, the EPA describes the release into groundwater from a point source as an "intervening cause," thus breaking the causal chain between a point source and navigable waters.¹⁶⁰ This alternative interpretation will undoubtedly influence the Supreme Court's decision when it addresses the issue in fall of 2019.

F. Supreme Court Review

After the Fourth Circuit ruled in favor of the plaintiffs, Kinder Morgan filed for a *writ of certiorari* with the Supreme Court.¹⁶¹ *Upstate*, along with *Hawai'i Wildlife Fund v. County of Maui (Hawai'i Wildlife)* (the Ninth Circuit decision decided on grounds similar to *Upstate*), were distributed for Conference twice in 2019.¹⁶²

In addition to a number of amicus briefs, the Solicitor General of the United States also filed a brief with the Supreme Court conveying the opinions of the United States.¹⁶³ As the Solicitor General asserts in the consolidated brief with *Hawai'i Wildlife*, it is the view of the United States that a *writ of certiorari* should be granted, but limited.¹⁶⁴ The United States argued in its brief that review by the Supreme Court should be limited to whether a violation of the CWA exists when a discharge of a pollutant is released from a point source without a permit, migrating through groundwater, and eventually into navigable waters.¹⁶⁵

155. *Id.* at 16,814.

156. *Id.* at 16,812.

157. 84 Fed. Reg. 16,810, at 16,812.

158. *Id.* at 16,814.

159. *Id.* at 16,813.

160. *Id.* at 16,812.

161. SCOTUSBLOG, *supra* note 18.

162. SCOTUSBLOG, COUNTY OF MAUI, HAWAII V. HAWAII WILDLIFE FUND, <https://www.scotusblog.com/case-files/cases/county-of-maui-hawaii-v-hawaii-wildlife-fund/> (last visited Mar. 11, 2019).

163. *Id.*

164. Brief for United States as Amici Curiae Supporting Petitioners, at 1, *Cty. Of Maui v. Hawai'i Wildlife Fund*, 881 F.3d 754 (9th Cir. 2018), No. 18-260, *Kinder Morgan Energy Partners, L.P., et. al., v. Upstate Forever, et. al.*, 887 F.3d 637 (4th Cir. 2018), No. 18-268.

165. *Id.*

As illustrated by the Solicitor General, the circuit courts inconsistently interpret the CWA's definition of "discharge of pollutants."¹⁶⁶ Specifically, the United States noted, the circuits have disagreed on whether "discharge of pollutants" incorporates instances where a pollutant is discharged from a point source but migrates through groundwater to ultimately reach navigable waters.¹⁶⁷ The Supreme Court agreed with the Solicitor and granted *certiorari* to decide one limited issue in *Hawaii Wildlife*: whether a pollutant must be discharged directly from a point source into navigable waters to constitute a CWA violation.¹⁶⁸ As of this writing, the Supreme Court has not ruled on the Petition for Certiorari in *Upstate*.

The Supreme Court may finally decide whether a CWA violation requires a discharge of pollutant directly from a point source to navigable water, or whether a violation may exist when a pollutant is discharged from a point source and travels through groundwater before reaching navigable water.¹⁶⁹ Doing so should help resolve much of the confusion regarding the relationship between a discharge of pollutant and a point source in the context of the CWA.¹⁷⁰ However, the Supreme Court considering *Hawai'i Wildlife* may be a limited, but important, resolution to *Upstate* as the facts of each case differ slightly and only one of the key issues in *Upstate* will be addressed.¹⁷¹ In *Hawai'i Wildlife*, the defendants operate a wastewater treatment facility where pollutants are injected into wells as a disposal method, but then migrate through groundwater and ultimately reach the Pacific Ocean.¹⁷² Unlike the point source in *Upstate* that transports pollutants from one location to another but leaked pollutants for a short time, the point source in *Hawai'i Wildlife* is four wells meant to hold pollutants in a single stationary position, but the pollutants travelled a much further distance.¹⁷³ Additionally, the facts in *Hawai'i Wildlife* suggest the defendants had knowledge the point sources were discharging pollutants.¹⁷⁴ However, the significance of the different point sources, their intended use, and the intent of the party discharging pollutants is unclear.

Nevertheless, the more notable distinction between *Upstate* and *Hawai'i Wildlife* is the fact that the point source in *Hawai'i Wildlife* continuously dis-

166. *Id.* at 12.

167. *Id.*

168. Order Granting Petition for Writ of Certiorari, *County of Maui v. Hawai'i Wildlife Fund*, 881 F.3d 754 (9th Cr. 2018), 139 S. Ct. 1164 (2019), No. 18-260. See also Ellen M. Gilmer, *Maui Moves to Nix Supreme Court Water Case, But Questions Linger*, BLOOMBERG ENVIRONMENT, (Sept. 20, 2019), <https://news.bloombergenvironment.com/environment-and-energy/maui-moves-to-nix-supreme-court-water-case-but-questions-linger> (reporting the Maui County Council recently voted to settle the case, and though its authority is unclear, such a result would render the case moot and likely increase the chance the Supreme Court grants *cert.* in *Upstate*).

169. See generally *County of Maui*, 881 F.3d 754.

170. *Id.*

171. *Id.*; *Upstate Forever*, 887 F.3d 637.

172. *Hawai'i Wildlife*, 881 F.3d at 758.

173. *Id.*; *Upstate Forever*, 887 F.3d at 643.

174. *Hawai'i Wildlife*, 881 F.3d at 758.

charged pollutants that ultimately reached navigable water, while the point source in *Upstate* stopped discharging completely.¹⁷⁵ Not only is this fact a potentially important distinction, but also whether a discharge from the point source was ongoing or continuous was a key issue in *Upstate*.¹⁷⁶ Given that this was not an issue in *Hawai'i Wildlife*, the Supreme Court likely will not provide any clarity soon on whether a court has jurisdiction over CWA citizen-suits when the point source is no longer discharging pollutants but pollutants continue to reach navigable waters.¹⁷⁷

IV. CONCLUSION

The Fourth Circuit's ruling in *Upstate* may extend the scope of potential violations of the CWA.¹⁷⁸ By interpreting "discharge of pollutants" from a point source to encompass discharges that indirectly reach navigable waters from point sources through groundwater, the court potentially broadens jurisdiction of federal courts to hear cases in which a point source is no longer discharging a pollutant.¹⁷⁹ This outcome, even with the limiting requirement for a sufficient connection, could result in more potential violations, and thus more lawsuits.

However, the Fourth Circuit's decision in *Upstate* is not wholly in concert with other circuit court decisions.¹⁸⁰ The lack of a uniform interpretation among federal courts regarding the jurisdictional scope the CWA grants to such courts may only lead to more confusion and schisms among courts, lawyers, businesses, and citizens until the Supreme Court or Congress provides some relief. Ultimately, either the Supreme Court needs to intervene to resolve the issue of interpretation, as it appears it is doing, or Congress needs to clarify the statute to prevent further confusion.

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175. *Hawai'i Wildlife*, 881 F.3d at 758-59; *Upstate Forever*, 887 F.3d at 648.

176. *Upstate Forever*, 887 F.3d at 646.

177. *Id.*; SCOTUSBLOG, *supra* note 162.

178. *Upstate Forever*, 887 F.3d at 652.

179. *Id.*

180. *Kentucky Waterways*, 905 F.3d 925.

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