No. 17-1640

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UPSTATE FOREVER AND SAVANNAH RIVERKEEPER,
Plaintiffs – Appellants,

v.

KINDER MORGAN ENERGY PARTNERS L.P. and
PLANTATION PIPE LINE COMPANY, INC.,
Defendants – Appellees,

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

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS UPSTATE FOREVER AND SAVANNAH RIVERKEEPER

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This action is a simple application of the Clean Water Act. The pipeline of Kinder Morgan Energy Partners, L.P. and Plantation Pipe Line Company, Inc. (collectively "Kinder Morgan"), is a point source. 33 U.S.C. § 1362(14) (any "pipe" is a point source). Kinder Morgan is adding petroleum pollutants from its pipeline to a water of the United States. 33 U.S.C. § 1362(12) (a "discharge is "any addition of any pollutant to navigable waters"). Kinder Morgan has no permit for the discharge. 33 U.S.C. §§ 1311(a) & 1342. Consequently, Kinder Morgan is violating the Clean Water Act and is subject to citizen enforcement. 33 U.S.C. § 1365(a)(1).

The responses of Kinder Morgan and its amici are an attempt to ignore the Act's plain language and to undercut the Act's protections of the Nation's waters.

I. The Pipe Is a Point Source and Its Discharges to Surface Waters Are Continuing.

A. Kinder Morgan's Pipe Break Is a Point Source.

Any pipe is a point source. 33 U.S.C. § 1362(14). Moreover, "the escape of liquid from [a] confined system is from a point source." *United States v. Earth Scis., Inc.*, 599 F.2d 368, 374 (10th Cir. 1979).

Kinder Morgan and its amici try to apply the "nonpoint source" label to Kinder Morgan's spill, but that characterization cannot fit. This spill is not runoff from "diffuse sources that are not regulated as point sources . . . normally . . .

associated with agricultural, silvicultural and urban runoff, [and] runoff from construction activities." U.S. Environmental Protection Agency ("EPA") Office of Water, *Nonpoint Source Guidance* 3 (1987). This pollution is the result of a defined spill of historic proportions from a single pipe only 1,000 feet from the waterway: "[N]onpoint source pollution does not result from a discharge at a specific, single location (such as a single pipe) but generally results from land runoff, precipitation, atmospheric deposition, or percolation." *Id.*

Courts have no difficulty in distinguishing between point and nonpoint pollution. *See, e.g., Greater Yellowstone Coal. v. Larsen*, 641 F. Supp. 2d 1120, 1139 (D. Idaho 2009) (no point source where runoff could take hundreds of years to move through four miles of groundwater to surface water).

B. Kinder Morgan's Illegal Discharges Are Ongoing.

A break in a pipe is not a violation of the Clean Water Act; the unpermitted discharge of pollutants into a water of the United States is. Under the Act, a "discharge" is "any addition of any pollutant to navigable waters." 33 U.S.C. § 1362(12). The "discharge" is the addition of the petroleum pollution to navigable waters, which continues today. Kinder Morgan does not dispute that the pipe is a point source;[1] it argues that once it fixed the pipe, the discharge stopped. But under the unambiguous language of the Act, Kinder Morgan did not violate the

[1] Resp. Br. 17, 28, ECF 43 (internal quotations and emphases omitted).

statute when its pipe broke; likewise, it did not eliminate its violation when it fixed its pipe.

Instead, Kinder Morgan violates the Act when it adds petroleum pollutants to a water of the United States. Pollutants from the pipeline were found in the waterway the first time the waterway was tested after the spill in January 2015, and Kinder Morgan's pollutants continue to flow into the waterway. If Kinder Morgan had stopped adding pollutants to the waterway, it would have ended its violation of the Clean Water Act—regardless of whether it had fixed its pipe. Instead, Kinder Morgan continues to add pollutants to the waterway and continues to violate the Act.

As this Court held in a controlling decision, "although a defendant's ***conduct*** that is causing a ***violation*** may have ceased in the past . . . what is relevant is that the ***violation*** is continuous or ongoing." *Goldfarb v. Mayor of Baltimore*, 791 F.3d 500, 513 (4th Cir. 2015) (emphases in original).

Contrary to Kinder Morgan's contention, the Complaint does not allege a one-time discharge into a waterway and mere continuing effects from that discharge. Resp. Br. 19-21, 32-34. Instead, pollution began discharging into the waterway almost immediately after the spill and continues discharging into the waterway today. Only one example of the documented ongoing addition of pollutants to the waterway is Kinder Morgan's report earlier this year that there are

two so-called "seeps" at the site, one 30 feet long and 12 feet wide, and another 12 feet long and 12 feet wide, App. 288, 315-22, impacting the water quality of the stream.

The continuing flow of pollutants into the waterway is a continuing "discharge," not the "effect" of a discharge that has ceased to flow into a waterway.

Kinder Morgan tries to avoid the rulings that have applied the Act's unambiguous language. Most notably, Kinder Morgan tries to dodge the precedential authority of this Court's *Goldfarb* decision. It makes an effort to distinguish *Goldfarb* as a case under the Resource Conservation and Recovery Act ("RCRA"), Resp. Br. 22-23, but the "in violation" language of RCRA is "identical" to the same provision in the Clean Water Act, and this Court expressly interpreted the RCRA language as though it was the Clean Water Act provision. 791 F.3d at 513.

Kinder Morgan contends that some—but not all—of the defendant's activities in *Goldfarb* were continuing. Resp. Br. 23. But the Court's holding was not based on any ongoing conduct: "[A]lthough a defendant's ***conduct*** that is causing a ***violation*** may have ceased in the past, for [the purposes of the "in violation of" language], what is relevant is that the ***violation*** is continuous or ongoing." 791 F.3d at 513 (emphases in original). Here, the pipe may have been

fixed, but the violation—the ongoing addition of pollutants to a water of the United States—continues, as in *Goldfarb*.

Kinder Morgan tries to rely upon *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987). But this Court applied *Gwaltney* in *Goldfarb* to determine that the Clean Water Act authorizes citizen enforcement as long as the "violation" is continuing, even though the conduct—here, the pipeline break—is in the past. 791 F.3d at 513. As Kinder Morgan concedes, in *Gwaltney* the polluter had stopped exceeding its permit limits and was no longer discharging "in violation of" its permit. Resp. Br. 18; 484 U.S. at 53-54. Here the addition of pollutants to the waterway is in no sense "wholly past," 484 U.S. at 67, but is occurring today as it was when the pipeline was unrepaired.

The plain language of the Clean Water Act, the Congressional purposes behind it, this Court's binding *Goldfarb* precedent, and *Gwaltney* all establish that Kinder Morgan is liable under the Act for continuing discharges to a water of the United States. In an attempt to save its position, Kinder Morgan misconstrues a variety of other legal authorities.

First, Kinder Morgan misses the point of the cases decided under Section 404 of the Clean Water Act, where courts have recognized that defendants are subject to citizen enforcement as long as they remain in violation of the Act for leaving wrongly deposited fill in a waterway. *See, e.g.*, *Sasser v. EPA*, 990 F.2d

127, 129 (4th Cir. 1993); *N.C. Wildlife Fed'n v. Woodbury*, 1989 WL 106517, at *2–3 (E.D.N.C. Apr. 25, 1989). Here too, as long as the violation continues—in this case, unpermitted discharges into a waterway in violation of Section 402—the polluter remains liable, even if conduct preceding the violation has stopped.

Kinder Morgan tries to avoid this simple principle by again misidentifying the "violation" of the Act in this case: The violation is the addition of pollutants to the waterway, not the break of the pipe. Under Section 404, the violation is the ongoing presence of the fill in the waterway, while under Section 402, the violation is the ongoing addition of pollutants to the waterway. In both instances, as long as that violation continues, citizens can enforce the Act.

For this reason, Kinder Morgan's remedial activities to date are beside the point. Pollutants from thousands of gallons of gasoline and diesel fuel continue to flow into the waterway. As this Court has held, remedial activity does not protect a Clean Water Act violator from liability; the only relevant question is whether there is a continuing discharge of pollutants into a water of the United States. *Am. Canoe Ass'n v. Murphy Farms*, 412 F.3d 536, 539-40 (4th Cir. 2005).

Also, Congress has expressly provided which actions provide an obstacle to this citizen enforcement action. Citizen enforcement is prevented only if EPA or

the state agency is diligently prosecuting a civil or criminal action in court, 33 U.S.C. § 1365(b)(1)(B). There is no such prosecution here.

Kinder Morgan's dramatic spill is entirely different from the situations faced by the few district court decisions on which it relies. This is not a case where leaks from long-abandoned facilities have migrated slowly or where there are only residual effects from events of years before. *See, e.g.*, *Wilson v. Amoco Corp*., 33 F. Supp. 2d 969, 975 (D. Wyo. 1998) (migrating pollutants from facilities closed years before); *Aiello v. Town of Brookhaven*, 136 F. Supp. 2d 81, 85 (E.D.N.Y. 2001) (migrating contaminants from landfill closed in 1974); *Crigler v. Richardson*, 2010 WL 2696506, at *1 (M.D. Tenn. July 7, 2010) (migration of pollutants from landfill defendant had not used for years); *Friends of Santa Fe Cty. v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1359 (D.N.M. 1995) (residual effects of past events).

Moreover, these few district court decisions have been criticized and rejected by more recent decisions in this Circuit and elsewhere. Indeed, in *Starlink Logistics, Inc. v. ACC, LLC*, the court refused to follow its prior *Crigler* decision because—as here—the Complaint alleged an "***ongoing*** discharge of pollutants . . . into water bodies." 2012 WL 2395199, at *13 (M.D. Tenn. June 25, 2012) (emphasis in original); *see also Ohio Valley Envtl. Coal., Inc. v. Hernshaw Partners, LLC*, 984 F. Supp. 2d 589, 597-98 (S.D. W. Va. 2013); *Marrero*

Hernandez v. Esso Standard Oil Co., 597 F. Supp. 2d 272, 285-86 (D.P.R. 2009); *Draper v. H. Roberts Family LLC*, 2009 WL 10668404, at *10-11 (N.D. Ga. Mar. 30, 2009).

C. These Point Source Discharges Are Adding Pollutants to Surface Waters.

There is no requirement in the Act that the point source be located directly above or in the waterway. To the contrary, the Act applies to "***any*** addition of any pollutant ***to*** navigable waters." 33 U.S.C. § 1362(12) (emphasis added). Thus, it is irrelevant that pollutants flow a mere 1,000 feet over and through the earth and groundwater to a water of the United States.

As Justice Scalia explained in *Rapanos v. United States*, "[t]he Act 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.'" 547 U.S. 715, 743 (2006) (citing 33 U.S.C. §§ 1362(12)(A) & 1311(a)) (emphases in original). And as EPA and the Department of Justice have stated, the Act covers "not only discharges directly to navigable waters, but also discharges of pollutants that travel from a point source to navigable waters over the surface of the ground or through underground means." Brief for United States as Amicus Curiae Supporting Plaintiffs, *Haw. Wildlife Fund v. Cty. of Maui*, Case No. 15-17447, Dkt. 40, at 10 (9th Cir.). Recognizing the clear statutory language, "courts have interpreted the term 'discharge of a pollutant' to cover discharges over the ground

and by other means," including numerous courts recognizing transmission through a direct groundwater connection as discussed below. *Id* at 16.

Just as Kinder Morgan tries to ignore the Act's plain language, it attempts to ignore the statute's central purpose. The Clean Water Act was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), by setting a goal to "eliminate[]" "the discharge of pollutants into the navigable waters[,]" *id.* § 1251(a)(1). When pollutants flow into surface waters, the Nation's waters continue to suffer regardless of whether a pipe has been repaired or whether the petroleum flows a mere 1,000 feet over and through the earth.

Indeed, Kinder Morgan would eviscerate the protections of the Clean Water Act. A polluter could simply move its point source back from a waterway or bury it and allow its pollution to flow a short distance to a water of the United States. The discharger could pollute with abandon and without a permit, because it would not be discharging "directly" into the Nation's waters. But the Act does not match this wrongheaded theory:

> Congress has explicitly stated that the objective of the [Clean Water Act] "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Therefore, it would hardly make sense for the [Clean Water Act] to encompass a polluter who discharges pollutants via a pipe running from the factory directly to the riverbank, but not a polluter who dumps the same pollutants into a man-made settling basin some distance short of the river and then allows the pollutants to seep into the river via the groundwater.

N. Cal. Riverwatch v. Mercer Fraser Co., 2005 WL 2122052, *2 (N.D. Cal. Sept. 1, 2005). The Act addresses the integrity of the Nation's waters and the addition of pollutants to waterways—not the location or repair of pipes.

Otherwise, Kinder Morgan tries to rely upon a series of decisions by ignoring the essential differences between those cases and this one. Here, Kinder Morgan spilled at least 369,000 gallons of petroleum just 1,000 feet upgradient from a waterway, producing a flow fourteen feet thick. That huge quantity of pollutants—from one specific and nearly adjacent point source—flowed into the waterway virtually immediately and continues discharging into the waterway today.

In contrast, the plaintiffs in *Hamker v. Diamond Chemical Co.*, 756 F.2d 392, 397 (5th Cir. 1985), alleged only that oil "is leaking into ground water and has left lasting damage to grasslands" and did "not allege a continuing discharge" to navigable waters—as the Complaint does. *See also Conn. Coastal Fishermen's Ass'n v. Remington*, 989 F.2d 1305, 1312 (2d Cir. 1993) (plaintiffs alleged that the discharge had "ceased" and no continuing discharge whatsoever). *Tri-Realty Co. v. Ursinus College*, 2013 WL 6164092, at *6 (E.D. Pa. Nov. 21, 2013), addressed soil contamination that "five or six years later" migrated to the surface and then was washed into a waterway—not a massive fuel spill that immediately began flowing into a nearby waterway and continues today.

D. These Unpermitted Discharges Violate the Clean Water Act.

Kinder Morgan argues that applying the Clean Water Act here would be unworkable because pipeline operators and others are not currently subject to a National Permitting Discharge Elimination System ("NPDES") permitting scheme "just in case there is an accidental leak." Resp. Br. 47. The pipeline amici argue against Clean Water Act liability by pointing out that Kinder Morgan does not have a permit for pipeline discharges into waters of the United States and would have difficulty obtaining one. Amici Br. 21-25, ECF 51-1. But the Clean Water Act does not grant pipelines such an exemption.

The Act is clear: the unpermitted discharge from a point source that continues to add pollutants to navigable waters is a violation of this strict liability statute and is subject to citizen enforcement. It is irrelevant that a pipeline spill is the result of an accident, negligence, or the irresponsible failure to undertake necessary monitoring and repair of an aging patch. *Am. Canoe Ass'n*, 412 F.3d at 540. In effect, the pipeline amici argue that the Act is violated only when a wastewater treatment facility operator violates the terms of an issued permit. Amici Br. 22 (liability should be limited to violations of "end of pipe" wastewater treatment permits).

For pipeline spills, the amici's argument has been repeatedly rejected. As one court stated, if the Clean Water Act "cannot apply to an accidental discharge

outside the permit scheme, a whole category of spills might enter the Nation's waters with impunity." *United States v. Texaco Expl. & Prod., Inc.*, 1999 WL 33597706, at *4 (D. Utah May 26, 1999). Similarly, courts have rejected the contention that the Act is "designed for application to planned discharges" and "intended only to apply to permit-related discharges." *Marathon Oil v. EPA*, 1998 WL 34075426, at *4-5 (D. Wyo. Aug. 20, 1998) (unpermitted pipeline spill releasing five barrels of oil violates Clean Water Act).

These decisions follow well-established law dating back to the Sixth Circuit's decision in *United States v. Hamel*, 551 F.2d 107, 109-113 (6th Cir. 1977). There, the court ruled that the unpermitted discharge of gasoline into a water of the United States—as in this case—violates the Clean Water Act. *See also Apalachicola Riverkeeper v. Taylor Energy Co., LLC*, 954 F. Supp. 2d 448, 454-57 (E.D. La. 2013) (unpermitted discharge from oil rig caused by hurricane violates Clean Water Act); *United States v. Colonial Pipeline Co.*, 242 F. Supp. 2d 1365, 1369-71 (N.D. Ga. 2002) (unpermitted pipeline spill covered by Clean Water Act).

Indeed, the amici's exact argument was rejected by the Fifth Circuit over twenty years ago in *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., Inc.*, 73 F.3d 546, 558-62 (5th Cir. 1996). There, the oil company argued that it could be held liable under the Act only if it violated a permit and that it could not be held

liable for polluting without a permit when EPA had not established a permitting program for its discharges. The court held: "Nothing in the [Act] limits a citizen's right to bring an action against a person who is allegedly discharging a pollutant without a permit solely to those cases where EPA has promulgated an effluent limitation or issued a permit that covers the discharge." *Id*. at 561.

Many courts have since restated the same conclusion. *See, e.g., Ass'n to Protect Hammersley v. Taylor Res., Inc*., 299 F.3d 1007, 1011-13 (9th Cir. 2002) (citizens may sue for unpermitted discharges even when state agency had no applicable permit program); *United States v. Ortiz*, 427 F.3d 1278, 1284 (10th Cir. 2005) (Act applies even criminally when no permit is available); *Soundkeeper, Inc. v. A & B Auto Salvage, Inc.*, 19 F. Supp. 3d 426, 434 (D. Conn. 2014).

Finally, the Oil Pollution Act ("OPA") was not applied to this spill, but the pipeline amici still discuss it at length. They never go so far as to claim it prevents application of the Clean Water Act to petroleum spills. Amici Br. 10-12, ECF 51-1. The pipeline industry has repeatedly lost that argument, and it is well established that pipelines are liable for spills under the Clean Water Act, apart from the OPA. *See, e.g., Hamel*, 551 F.2d at 112 n.8. Kinder Morgan cannot make such an argument, since it has paid Clean Water Act settlements for spills from the Plantation Pipeline. App. 11-13 (Compl. ¶¶ 28-34).

II. The Clean Water Act Covers Discharges to Surface Waters Via Direct Hydrologic Connection.

As EPA and legions of courts have recognized for decades, the Clean Water Act applies to discharges of pollutants from a point source into surface waters via a direct hydrologic connection through groundwater.

This Court held: "The power over navigable waters . . . carries with it the authority to regulate nonnavigable waters when that regulation is necessary to achieve Congressional goals in protecting navigable waters." *United States v. Deaton*, 332 F.3d 698, 707 (4th Cir. 2003). Here, the issue is even simpler, because it concerns discharges into undisputed surface waters of the United States. This case does not involve regulating discharges of pollutants into groundwater per se. The Clean Water Act applies only where direct groundwater flows carry identifiable discharges of pollutants from a point source into surface waters.

A. The Overwhelming Majority of Courts Support the Conservation Groups' Position.

Several circuit courts recognize that the Clean Water Act applies to pollutant discharges to surface waters through groundwater with a direct hydrological connection. The Second Circuit upheld EPA's regulation of pollutant discharges via groundwater into surface waters from concentrated animal feeding operations. *Waterkeeper All., Inc. v. EPA*, 399 F.3d 486 (2d Cir. 2005). The Second Circuit supported EPA's case-by-case approach to regulating such discharges, given that

"variability in topography, climate, distance to surface water, and geologic factors influence whether and how pollutant discharges at a particular site enter surface water via groundwater." *Id*. at 515.

Tenth Circuit precedents "foreclose any argument that the [Clean Water Act] does not protect groundwater with some connection to surface waters." *Friends of Santa Fe Cty. v. LAC Minerals*, 892 F. Supp. 1333, 1358 (D.N.M. 1995). In a challenge to EPA permits, the Tenth Circuit upheld Clean Water Act coverage of flows carrying pollutants "through underground acquifers [sic]. . . into navigable-in-fact streams." *Quivira Mining Co. v. EPA*, 765 F.2d 126, 130 (10th Cir. 1985).

The Ninth Circuit has also recognized Clean Water Act coverage based on a hydrologic connection through groundwater. *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 1000 (9th Cir. 2007).

A long list of district court decisions over four decades affirm that the Act applies to discharges of pollutants to surface waters via a direct hydrologic connection of groundwater. *See* footnote 7 of the Conservation Groups' opening brief.

By contrast, the handful of cases cited by Kinder Morgan erroneously focus on the fact that groundwater is not within the definition of waters of the United States, an issue that is irrelevant here. Some of these cases note that all groundwater may eventually make its way to surface waters, but this observation is

inapposite because no one here seeks to redefine groundwater as jurisdictional.

Thus, the Fifth Circuit held that the "definition [of 'navigable waters'] is not so expansive as to include groundwater within the class of waters protected by the [Act]," a point that is not in dispute. *Rice v. Harken Expl. Co.*, 250 F.3d 264, 269 (5th Cir. 2001). In that case, the plaintiffs failed to provide "evidence of a close, direct and proximate link between [the defendant's] discharges of oil and any resulting actual, identifiable oil contamination of a particular body of natural surface water." *Id.* at 272.

Here, Kinder Morgan's petroleum pollutants flow in an easily identifiable path. There is no dispute that the pipeline is the source of these pollutants and that they are currently discharging to surface waters a few hundred feet away. *See Haw. Wildlife Fund v. Cty. of Maui*, 24 F. Supp. 3d 980, 1000 (D. Haw. 2014) (identifying direct transmission through groundwater). As compared with *Maui*, the pollutants here are traveling a much shorter distance and moving much more quickly into surface waters.

By contrast, the mere "possibility" of a hydrologic connection is not enough. *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994). In *Oconomowoc Lake*, no direct connection to surface waters was alleged or proven. Moreover, *Oconomowoc Lake* was decided, and *Rice* was briefed, prior to EPA's 2001 Federal Register notice, which contained extensive support for

EPA's position. Subsequent to this fuller statement, the District of Oregon and District of Idaho reversed themselves and recognized Clean Water Act coverage of discharges like these. *Nw. Envtl. Def. Ctr. v. Grabhorn, Inc.*, 2009 WL 3672895, at *11 (D. Or. Oct. 30, 2009); *Greater Yellowstone Coal. v. Larsen*, 641 F. Supp. 2d 1120, 1138-39 (D. Idaho 2009) (implicitly refuting *United States v. ConAgra, Inc.*, 1997 WL 33545777, at *6 (D. Idaho Dec. 31, 1997)).

In contrast to *Oconomowoc Lake*, the Seventh Circuit's *U.S. Steel* decision squarely addressed the issue of a direct hydrologic connection discharging pollutants to surface water and held that the Act applies to such discharges. *U.S. Steel Corp. v. Train*, 556 F.2d 822, 852 (7th Cir. 1977) (EPA may regulate pollutant disposal into deep injection wells in conjunction with surface water discharge limitations), *overruled on other grounds by City of W. Chicago v. U.S. Nuclear Regulatory Comm'n*, 701 F.2d 632, 644 (7th Cir. 1983). Kinder Morgan has no answer to this ruling, protesting only that it was not a citizen suit. That makes no difference: the issue is whether the Clean Water Act applies to such discharges, and the Seventh Circuit's ruling confirms it does.

Kinder Morgan's district court cases fare no better. They address the jurisdictional status of groundwater per se. But the Conservation Groups do not seek to include groundwater—even if hydrologically connected—within jurisdictional waters. Thus, *Cape Fear* addressed the wrong issue. The court ruled

that groundwater is not navigable waters "within the meaning of the statute." *Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc.*, 25 F. Supp. 3d 798, 810 (E.D.N.C. 2014). As *Yadkin* subsequently explained, the reasoning exemplified by *Cape Fear* "may largely flow from a lack of clarity" that the relevant jurisdictional waters are not groundwater, but rather surface waters polluted by a discharge through a direct groundwater conduit. *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428, 445 (M.D.N.C. 2015) (quoting *Haw. Wildlife Fund*, 24 F. Supp. 3d at 996).

Both the *Apex Oil* and *Tri-Realty* cases follow the same flawed reasoning as *Cape Fear*. Both relied on Congressional intent and the *Rapanos* decision to conclude that groundwater should not be considered navigable waters. *Chevron U.S.A., Inc. v. Apex Oil Co., Inc.*, 113 F. Supp. 3d 807, 817 (D. Md. 2015); *Tri-Realty Co. v. Ursinus College*, 2013 WL 6164092, at *9 (E.D. Pa. Nov. 21, 2013). Moreover, *Tri-Realty* concerned pollution whose connection to surface waters was never shown—with not even a possible discharge until "some five or six years later"—in contrast to the direct and immediate discharge of pollutants into surface waters in this case. 2013 WL 6164092, at *6.

The only other decision Kinder Morgan cites in support, *Umatilla*, was expressly disavowed by that court: "In light of the EPA's regulatory pronouncements, this court concludes that, ***contrary to Umatilla***, the [Clean Water

Act] covers discharges to navigable surface waters via hydrologically connected groundwater." *Nw. Envtl. Def. Ctr.*, 2009 WL 3672895, at *11 (emphasis added). Similarly, industry amici's reliance on the Idaho *ConAgra* case—whose reasoning was rejected by later decisions of that court[2]—demonstrates the weakness of their position. Amicus Br. 16, ECF 53-1.

The sole case relied on by the state amici, *26 Crown*, rejected a claim that did not plausibly allege a discharge of pollutants to surface waters and found standing only for discharges into the plaintiffs' basement. In dicta, the court asserted that "a pollution-of-navigable-waters-by-ground-water-contamination theory necessarily relies on an assumption that ground water must function as a 'point source' conduit for the pollution of navigable waters," and rejected that idea. *26 Crown Assocs., LLC v. Greater New Haven Reg'l Water Pollution Control Auth.*, 2017 WL 2960506, at *7 (D. Conn. July 11, 2017).[3] However, that assumption was incorrect: there is no requirement that discharges of pollutants travel only through point sources directly to surface water. On the contrary, as Justice Scalia stated in *Rapanos:* "The Act does not forbid the 'addition of any pollutant ***directly*** to navigable waters from any point source,' but rather the

[2] *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1180 (D. Idaho 2001); *Greater Yellowstone Coal. v. Larsen*, 641 F. Supp. 2d 1120, 1138-39 (D. Idaho 2009).

[3] *26 Crown* has been appealed and may conflict with *Waterkeeper All.*, 399 F.3d 486 (2d Cir. 2005).

'addition of any pollutant ***to*** navigable waters.'" *Rapanos v. United States*, 547 U.S. 715, 743 (2006) (emphasis in original) (citations omitted).

Thus, the Act authorizes citizens "to adjudicate claims where, as alleged in this case, pollutants travel from a point source to navigable waters through hydrologically connected groundwater ***serving as a conduit between the point source and the navigable waters***." *Yadkin*, 141 F. Supp. 3d at 445 (emphasis added).

In a recent Tennessee case dealing with coal ash pollution flowing via groundwater conduits into an adjacent river, Chief Judge Crenshaw endorsed the reasoning of *Yadkin* and EPA's longstanding position: "a cause of action based on an unauthorized point source discharge may be brought under the [Clean Water Act] based on discharges through groundwater, if the hydrologic connection between the source of the pollutants and navigable waters is direct, immediate, and can generally be traced." *Tenn. Clean Water Network v. Tenn. Valley Auth.*, — F.Supp.3d —, 2017 WL 3476069, at *44 (M.D. Tenn. Aug. 4, 2017).

Other recent decisions are consistent with this majority view. *Flint Riverkeeper, Inc. v. S. Mills, Inc.*, 2017 WL 2059659, at *5 (M.D. Ga. May 12, 2017), *aff'd*, 2017 WL 3599194 (M.D. Ga. Aug. 15, 2017) (discharge via groundwater with direct hydrological connection); *Sierra Club v. Virginia Elec. & Power Co.*, 2017 WL 1095039, at *6 (E.D. Va. Mar. 23, 2017) ("The [Act]

regulates the discharge of arsenic into navigable surface waters through hydrologically connected groundwater").

As *Yadkin*, *Tennessee Clean Water Network*, and numerous others make clear, the definition of navigable waters is not altered by a recognition that discharges via hydrologically connected groundwater can be sufficiently direct and identifiable to be subject to the Act. As this Court already has concluded, discharges through ***nonnavigable*** waters are subject to the Act when it is necessary to protect ***navigable*** waters from illegal pollution. *Deaton*, 332 F.3d at 707.

B. EPA Has Applied the Act to Such Discharges for Decades.

For decades, EPA has recognized that the Clean Water Act applies to discharges to surface waters via hydrologically connected groundwater. Kinder Morgan does not acknowledge EPA's longstanding position or respond to it at all. However, its supporting amici misrepresent EPA's position.

Contrary to the industry amici brief, in *Kelley v. United States*, 618 F. Supp. 1103, 1105-06 (W.D. Mich. 1985), EPA argued only that the Act does not "generically encompass groundwater." Amicus Br. 13-14, ECF 53-1. EPA contrasted that issue with the Seventh Circuit's *U.S. Steel* decision, which upheld EPA's regulation of discharges through groundwater ***in connection with the protection of surface waters***. Amicus Br. Addendum 34-35, ECF 56-1. Nowhere in its brief did EPA argue that point source discharges to surface waters through a

direct groundwater connection were exempt from the Act.

Despite amici's attempts to sow confusion, EPA's application of the Clean Water Act to such discharges reaches back forty years to its 1977 injection well permitting, *U.S Steel*, 556 F.2d at 852, and has been crystal clear for decades. In 2001, EPA set forth its most comprehensive analysis—a "general jurisdictional determination," and an "agency policy determination" that "involve[d] policymaking" to fill "an interpretive gap in the statutory structure" that Congress intended EPA to fill. 66 Fed. Reg. 2,960, 3,018 (Jan. 12, 2001). EPA also clarified subsequently that "nothing in the 2003 [final] rule was to be construed to expand, diminish, or otherwise affect the jurisdiction of the [Act] over discharges to surface water via groundwater that has a direct hydrologic connection to surface water." 73 Fed. Reg. 70,418, 70,420 (Nov. 20, 2008). In 2015, EPA again reaffirmed its "longstanding and consistent interpretation" and noted that it is unaffected by "the exclusion of groundwater from the definition of 'waters of the United States.'"[4]

EPA also has implemented its approach consistently by issuing individual and general NPDES permits subject to notice, comment, and judicial review. "EPA and states have been issuing permits for this type of discharge from a

[4] EPA, *Response to Comments—Topic 10 Legal Analysis*, 386 (June 30, 2015), https://19january2017snapshot.epa.gov/sites/production/files/2015-06/documents/cwr_response_to_comments_10_legal.pdf.

number of industries, including chemical plants, concentrated animal feeding operations, mines, and oil and gas waste-treatment facilities."[5] EPA Amicus Br., No. 15-17447, Dkt. 40, at 29-30. For example, an EPA permit prohibits concentrated animal feeding operations from discharging "manure, litter, or process wastewater from retention or control structures to surface waters of the United States through groundwater with a direct hydrologic connection to surface waters" and requires a liner for these structures where such connections exist.[6]

Since EPA first acknowledged that the Clean Water Act addresses pollution carried from a point source to surface waters by groundwater with a direct hydrologic connection, Congress has amended the Clean Water Act on several occasions. Yet, it has never acted to change the plain meaning of the statutory language.[7] In fact, when Congress passed the Safe Drinking Water Act in 1977, it took for granted that the Clean Water Act regulated discharges into deep water

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[5] Citing NPDES Permit No. NM0022306, *available at* https://www.env.nm.gov/swqb/Permits/; NPDES Permit No. WA0023434, *available at* https://yosemite.epa.gov/r10/water.nsf/NPDES+Permits/CurrentOR&WA821.

[6] General NPDES Permit for Discharges from Concentrated Animal Feeding Operations in New Mexico (NMG010000) (Sept. 1, 2016), at Parts II.A.2(b)(vi) and II.D.1, *available at* https://www3.epa.gov/region6/water/npdes/cafo/NMG010000%20FINAL%20Permit%20NM%20CAFO-signed%20eff%209-1-16.pdf.

[7] EPA, *History of the Clean Water Act*, https://www.epa.gov/laws-regulations/history-clean-water-act (last visited Sept. 27, 2017).

wells when there is an associated "discharge into navigable waters." H.R. Rep. No. 93-1185, at 6457 (1974).

While the statutory language of the Clean Water Act is clear, to the extent the Court finds any ambiguity, it should defer to EPA's longstanding position as many other courts have done. *See, e.g.*, *Greater Yellowstone*, 641 F. Supp. 2d at 1138-39. Moreover, the Supreme Court has deferred to a very similar EPA determination about coverage of logging discharges because it was a "rational interpretation" and EPA "has been consistent in its view" as to which discharges require permits. *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 614 (2013).

EPA has been consistent in its position for decades and made clear in its 2001 determination that it was engaging in administrative policymaking utilizing agency "expertise in environmental science and policy" to make "an ecological judgment" that fills "an interpretive gap in the statutory structure." 66 Fed. Reg. at 3,018. Its case-by-case approach in the 2003 rule is consistent with that policy. All these manifestations of EPA's longstanding position merit deference.

C. Clean Water Act Coverage of Hydrologically Connected Discharges Has Been Implemented Successfully Already.

Kinder Morgan and its allies resort to scare tactics, manufacturing a parade of horribles if the Court follows the Act's language as have EPA and the vast majority of courts. However, the Act has been so applied for four decades across the country, with no such consequences.

The states' amicus brief does not recognize that many of them are located in jurisdictions that ***already*** recognize Clean Water Act coverage of such hydrologically-connected discharges, including West Virginia,[8] Alabama,[9] Kansas, Oklahoma, Utah,[10] and Indiana.[11]

As set out in this reply and in footnote 7 of the Conservation Groups' opening brief, the jurisdictions that recognize Clean Water Act coverage of such discharges span some twenty-four states that could not be more diverse—Alabama, California, Colorado, Connecticut, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming—as well as Puerto Rico. Many of those decisions have been in place for decades. Hundreds of counties ostensibly represented by another amicus are located in these jurisdictions.

Without any evidence, the amici posit dire consequences that ***might*** follow a decision by this Court, failing to acknowledge that Clean Water Act coverage of hydrologically connected discharges via groundwater is ***already*** the law of the land

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[8] *Ohio Valley Envtl. Coal. Inc. v. Pocahontas Land Corp.*, 2015 WL 2144905 (S.D.W. Va. May 7, 2015).
[9] *Tenn. Riverkeeper v. Hensley-Graves Holdings, LLC*, No. 2:13-CV-877-LSC (N.D. Ala. Aug. 20, 2013) (attached as an Addendum).
[10] The Tenth Circuit includes Kansas, Oklahoma, and Utah. *Quivira*, 765 F.2d 126 (10th Cir. 1985).
[11] *U.S. Steel Corp.*, 556 F.2d at 852 (7th Cir. 1977).

in their jurisdictions, and in many instances has been for decades. At the same time, they ignore the dire consequences for the waters of the Nation if this surface water pollution was beyond the reach of the Clean Water Act.

These applications of the Act comport with state regulatory schemes because they do what the Act has always done: address point source discharges of pollution to surface waters. Kinder Morgan and amici claim that other regulations and industries would be disrupted, but they rely on the fallacy that groundwater would somehow be treated as jurisdictional waters.

As EPA explained recently:

> The state's authority to protect groundwater is in no way impaired by subjecting point sources to NPDES-permit requirements to protect surface waters. . . . This emphatically is not a case about the regulation of groundwater. Instead it is about the regulation of discharges of pollutants to waters of the United States.

EPA Amicus Br., Case No. 15-17447, Dkt. 40, at 21.

No expansion of the Clean Water Act or its permitting program to cover groundwater, "soils," or nonpoint source pollution (such as runoff) would or could follow from this Court's decision, despite the amici's claims.

EPA has explained that applying the Act to discharges via a direct groundwater connection to surface waters is "a factual inquiry like all point source determinations." 66 Fed. Reg. at 3,017. "A general hydrological connection between all groundwater and surface waters is insufficient." EPA Amicus Br., No.

15-17447, Dkt. 40, at 24. Instead,

> Ascertaining whether there is a direct hydrological connection is a fact-specific determination. To qualify as "direct," a pollutant must be able to proceed from the point of injection to the surface water without significant interruption. Relevant evidence includes the time it takes for a pollutant to move to surface waters, the distance it travels, and its traceability to the point source.

Id. at 27 (citing 66 Fed. Reg. at 3,017). Only those discharges from an identifiable point source flowing directly to surface waters are subject to the Act (and indeed are already subject to EPA permitting), while slow-moving, distant, or diffuse movements of pollution that cannot be traced to a point source do not qualify.

Kinder Morgan and its amici claim erroneously that Clean Water Act permitting would have to be dramatically expanded, including to septic systems. This is a red herring. Septic systems are designed to treat human waste through "adsorption, dispersion, and biodegradation" in soil, and ordinarily do not discharge to surface waters.[12] However, the rare systems that do discharge "disease-causing pathogens and nitrates" to surface waters are ***already*** covered by Clean Water Act permitting requirements: "[s]ystems discharging to surface waters are regulated under EPA's Clean Water Act [NPDES permitting] program." EPA, *Septic Systems Overview*, https://www.epa.gov/septic/septic-systems-overview (last visited Sept. 27, 2017). The septic issue further confirms that Clean Water

[12] EPA, *Large-Capacity Septic Systems*, https://www.epa.gov/uic/large-capacity-septic-systems (last visited Sept. 27, 2017).

Act coverage of hydrologically connected discharges has been implemented successfully.

The fact that state regulations also apply to Kinder Morgan's spill but have failed to stop the ongoing discharges into navigable waters only affirms the importance of enforcing the Clean Water Act's charge to eliminate illegal discharges of pollutants into waters of the United States.

Respectfully submitted this 29th day of September, 2017.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that this document contains 6,445 words and that this document was prepared using a proportionally spaced typeface, Times New Roman, 14 point.

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Dated this 29th day of September 2017

ADDENDUM FOR UNPUBLISHED DISPOSITION NOT AVAILABLE IN A PUBLICLY ACCESSIBLE ELECTRONIC DATABASE

FILED
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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

TENNESSEE RIVERKEEPER, INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	2:13-CV-877-LSC
	)	
HENSLEY-GRAVES HOLDINGS, LLC,	)	
	)	
Defendant.	)	

MEMORANDUM OF OPINION AND ORDER

I. Introduction

Plaintiff Tennessee Riverkeeper, Inc. ("Plaintiff") brings claims for violations of the Clean Water Act ("CWA") and the Resource Conservation and Recovery Act ("RCRA") against Defendant Hensley-Graves Holdings, LLC ("HGH"). This matter is before the Court on a motion to dismiss filed by HGH. (Doc. 19.) For the reasons set forth below, the motion to dismiss is DENIED.

II. Background[1]

[1] For purposes of this opinion, the facts are accepted as alleged in Plaintiff's Complaint. *See Grossman v. Nationsbank, N.A.*, 225 F.3d 1228, 1231 (11th Cir. 2000). Recitation of the facts alleged by Plaintiff is not to be construed as a verification that the allegations are true.

From approximately 1965 until 1987, the City of Florence, Alabama operated an unlined landfill known today as the Old Florence Landfill ("Landfill"), which accepted industrial and municipal waste until 1987. Since at least the Landfill's closure, contaminated leachate has been discharged on an ongoing basis from the Landfill into the groundwater. The contaminants then flow through a natural spring into Cypress Creek, a tributary of the Tennessee River. The leachate contains high levels of pollutants that can significantly affect the chemical, physical, and biological integrity of Cypress Creek, as well as the downstream Tennessee River. Sometime around December 8, 2008, HGH purchased the property with the intent to develop it in the future. Throughout its ownership, HGH has never operated the property as a landfill or disposed of any trash, waste, or other materials on the property.

Plaintiff is a non-profit membership corporation concerned with the preservation and protection of the Tennessee River and its tributaries. The organization actively pursues enforcement of environmental laws, including the CWA and RCRA, on behalf of and for the benefit of its members. Plaintiff's members have recreated in, used, and enjoyed Cypress Creek and the Tennessee River in the past, and they intend to do so in the future. However, they now recreate less on Cypress Creek due to the discharges from the Landfill. The discharges have also had an adverse

impact on aquatic life and water quality in Cypress Creek and the Tennessee River, making the waters less suitable for fishing, boating, and other outdoor activities. The members would recreate more in and around Cypress Creek and the Tennessee River if the discharges ceased.

On February 19, 2013, HGH received Plaintiff's letter explaining its intent to sue (the "February Notice"). A copy of the February Notice was mailed to the Administrator of the Environmental Protection Agency ("EPA"), the Regional Administrator of Region IV of the EPA, and the Director of the Alabama Department of Environmental Management ("ADEM"). More than sixty days passed following the February Notice, and the violations did not cease. Neither the EPA nor the State of Alabama commenced a civil or criminal enforcement action or an administrative action prior to Plaintiff filing this action.

In response to Plaintiff's complaint, HGH filed a motion to dismiss, pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 12(b)(7). The motion argues that (1) Plaintiff lacks both constitutional and statutory standing; (2) Plaintiff fails to state a claim under the CWA; (3) Plaintiff fails to state a claim under the RCRA; and (4) Plaintiff failed to include an indispensable party in the lawsuit. The court will address each of these arguments in turn.

III. Motions to Dismiss Under Rule 12(b)(1)

A. Standard of Review

A Rule 12(b)(1) motion challenges the Court's subject matter jurisdiction and takes one of two forms: a "facial challenge" or a "factual challenge." A facial challenge on the complaint requires the Court to assess whether a plaintiff has alleged a sufficient basis for subject matter jurisdiction. *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990). Under a facial attack, the allegations in the complaint are taken as true for the purposes of this motion. *Sea Vessel, Inc. v. Reyes*, 23 F.3d 345, 347 (11th Cir. 1994). A factual challenge, on the other hand, questions the existence of subject matter jurisdiction based on matters outside the pleadings. *Lawrence*, 919 F.2d at 1529. Under a factual challenge, the Court may hear conflicting evidence and decide the factual issues that determine jurisdiction. *Colonial Pipeline Co. v. Collins*, 921 F.2d 1237, 1243 (11th Cir. 1991). The burden of proof is on the party averring jurisdiction. *Thomson v. Gaskill*, 315 U.S. 442, 446 (1942). Here, Defendant brings both types of challenge, alleging that Plaintiff fails to demonstrate Article III standing in its complaint and that it failed to meet statutory notice requirements to bring CWA and RCRA claims.

B. Constitutional Standing[2]

HGH contends that Plaintiff lacks standing under Article III of the Constitution to pursue this case. Specifically, it argues that Plaintiff has failed to identify how its members have suffered an individualized or concrete injury as a result of the discharges from the Landfill. Plaintiff's generic and formulaic recitation of injury, according to HGH, is insufficient to demonstrate standing.

In order to satisfy Article III's standing requirements, Plaintiff must show that: (1) it has suffered a concrete and particularized injury that is actual or imminent, rather than conjectural or hypothetical; (2) the injury is fairly traceable to HGH's allegedly wrongful conduct; and (3) the injury is likely to be redressed by a decision in Plaintiff's favor. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180-181 (2000) (*citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)). In an environmental case, an organization such as Plaintiff can establish a sufficient injury by alleging that its members use an area impacted by the alleged violations and that the aesthetic and recreational values of the area have been harmed. *Sierra Club v. Johnson*, 436 F.3d 1269, 1279 (11th Cir. 2006). *See American Civil Liberties Union of Florida, Inc.*

[2] "Because standing is jurisdictional, a dismissal for lack of standing has the same effect as a dismissal for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1)." *Cone Corp. v. Fla. Dep't of Transp.*, 921 F.2d 1190, 1203 n.42 (11th Cir. 1991).

v. Dixie Cty, Fla., 690 F.3d 1244, 1248 (11th Cir. 2012) (organizational standing requires the organization to show that its members would otherwise have standing to sue in their own right).[3] At the pleading stage, "general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at 561.

Here, Plaintiff has alleged precisely the type of injury required in *Johnson*. 463 F.3d at 1279. It states specifically that its members use Cypress Creek and the Tennessee River for fishing, boating , and observing wildlife, among other activities. It also asserts that the waterways in question are being adversely impacted by the Landfill's discharges, damaging the waterways' usefulness for these activities. Furthermore, it alleges that its members' recreation and aesthetic interests in the area have been diminished and that those members would pursue more of these activities

[3] An organizational plaintiff must also show that the interests it seeks to protect are germane to the organization's purpose and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *American Civil Liberties Union of Florida*, 690 F.3d at 1248. Plaintiff has made clear in its complaint that it is dedicated to the protection of the Tennessee River through enforcement of environmental laws, and this case is certainly pertinent to those interests. Further, Plaintiff's claims and requested relief do not require the participation of its members in the lawsuit.

in the area if the violations ceased. These factual allegations are sufficient to support constitutional standing.

C. Statutory Standing

HGH next contends that Plaintiff lacks statutory standing to pursue this case because it did not comply with the sixty-day pre-suit notice requirements of the RCRA and CWA. *See* 33 U.S.C. § 1365; 42 U.S.C. § 6972. This is a factual attack in that it challenges the sufficiency of the February Notice, which is not a part of the pleadings.

The purpose of the sixty-day notice is to give government agencies an opportunity to take responsibility for enforcing environmental regulations, and to give the alleged violator an opportunity to come into compliance with the act. *Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 29 (1989). If a plaintiff fails to comply with the notice requirement, the case must be dismissed. *See Nat'l Envtl. Found. v. ABC Rail Corp.*, 926 F.2d 1096, 1097 (11th Cir. 1991). Under the CWA and RCRA, the sixty-day notice must contain: (1) sufficient information to permit the recipient to identify the standard alleged to have been violated; (2) the activity at the source of the violation; (3) the parties responsible; (4) the location and dates of the violation; and (5) the contact information of the party giving notice. *See* 40 C.F.R. § 135.3; 40 C.F.R. § 254.3.

In this case, the February Notice lays out the alleged violations and their factual bases in detail. First, it specifies that HGH is in violation of sections 301 and 402 of the CWA and section 4005 of the RCRA. (Doc. 16-1 at 3, 4.) Second, it indicates that "[c]ontaminated leachate from the Old Florence Landfill has been discharged to Cypress Creek on a continuing, uninterrupted, and daily basis since at least 1987." (*Id.* at 3.) Third, it lists a number of specific dates on which discharges were observed. (*Id.* at 3–4.) Fourth, it provides the exact coordinates where the pollutants are discharged into Cypress Creek. (*Id.* at 3.) Finally, it provides sufficient contact information, directing correspondence to Plaintiff's counsel and providing a mailing address, phone number, and email address. (*Id.* at 2.) Although HGH may have desired more information, Plaintiff's February Notice complies with the sixty-day notice requirements of the CWA and RCRA.

IV. Motions to Dismiss Under Rule 12(b)(6)

HGH further argues that Plaintiff failed to state a claim because the alleged discharge of pollutants from the Landfill to the groundwater is not actionable under the CWA or RCRA.

A. Rule 12(b)(6) Standard[4]

A defendant may move to dismiss a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) if the plaintiff has failed to state a claim upon which relief may be granted. "When considering a motion to dismiss, all facts set forth in the plaintiff's complaint 'are to be accepted as true and the court limits its consideration to the pleadings and exhibits attached thereto.'" *Grossman v. Nationsbank, N.A.*, 225 F.3d 1228, 1231 (11th Cir. 2000) (quoting *GSW, Inc. v. Long County*, 999 F.2d 1508, 1510 (11th Cir. 1993)). Further, all "reasonable inferences" are drawn in favor of the plaintiff. *St. George v. Pinellas County*, 285 F.3d 1334, 1337 (11th Cir. 2002).

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).

[4] Both parties submitted reports from the Alabama Department of Environmental Management with their briefs. Defendants argued that their report could be considered by the court on the 12(b)(6) motion, as being "central to the Plaintiff's claim." The Court disagrees and does not consider materials outside the pleadings for the purpose of the 12(b)(6) motions.

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal citations omitted).[5] The plaintiff must plead "enough facts to state a claim that is plausible on its face." *Id.* at 570. Unless a plaintiff has "nudged [his] claims across the line from conceivable to plausible, [the] complaint must be dismissed." *Id.*

"[U]nsupported conclusions of law or of mixed fact and law have long been recognized not to prevent a Rule 12(b)(6) dismissal." *Dalrymple v. Reno*, 334 F.3d 991, 996 (11th Cir. 2003) (quoting *Marsh v. Butler County, Ala.*, 268 F.3d 1014, 1036 n.16 (11th Cir. 2001)). And, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged — but it has not 'show[n]' — 'that the pleader is entitled to relief.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1950 (2009) (quoting Fed. R. Civ. P. 8(a)(2)). Therefore, the Supreme Court suggested that courts adopt a "two-pronged approach" when considering motions to dismiss: "1) eliminate any allegations in the complaint that are merely legal conclusions; and 2) where there are well-pleaded factual allegations, 'assume their

[5] In *Bell Atl. Corp. v. Twombly*, the U.S. Supreme Court abrogated the oft-cited standard that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" set forth in *Conley v. Gibson*, 355 U.S. 41 (1957). *Bell Atl. Corp.*, 550 U.S. at 560-63. The Supreme Court stated that the "no set of facts" standard "is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Id.* at 563.

veracity and then determine whether they plausibly give rise to an entitlement to relief.'" *American Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1290 (11th Cir. 2010) (quoting *Iqbal*, 129 S. Ct. at 1950).

Importantly, "courts may infer from the factual allegations in the complaint 'obvious alternative explanation[s],' which suggest lawful conduct rather than the unlawful conduct the plaintiff would ask the court to infer." *Id.* (quoting *Iqbal*, 129 S. Ct. at 1951-52). However, "[a] complaint may not be dismissed because the plaintiff's claims do not support the legal theory he relies upon since the court must determine if the allegations provide for relief on any possible theory." *Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997).

B. Clean Water Act Claim

The CWA prohibits the discharge of any pollutant from a point source unless authorized by a permit issued under the National Pollutant Discharge Elimination System ("NPDES"). 33 U.S.C. §§ 1311(a), 1342. To establish a CWA violation, Plaintiff "must prove that (1) there has been a discharge; (2) of a pollutant; (3) into [a navigable water]; (4) from a point source; (5) without a NPDES permit." *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1008 (11th Cir. 2004). HGH contends that leachate from the Landfill does not constitute a "point source discharge,"

groundwater does not constitute a "navigable water," and any violation is "wholly past" for purposes of the CWA.

1. Point Source Discharge

A "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The CWA defines a "point source" as "any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." *Id.* § 1362 (14). Courts in the Eleventh Circuit interpret the term broadly. *Parker*, 386 F.3d at 1009. In *Parker*, the Court of Appeals held that piles of industrial debris collecting storm water constituted a point source for purposes of the CWA. *Id.* (concluding that storm water runoff may not always originate from a point source, but it does when it collects in a location like a pile of industrial debris) (citing *Avoyelles Sportsmen's League v. Marsh*, 715 F. 2d 897, 922 (5th Cir. 1983) (finding that bulldozers and backhoes were point sources)). Further, the issue of whether a discharge originated from a point source is necessarily a fact-laden inquiry. *See Sierra Club v. Abston Constr. Co., Inc.*, 620 F.2d 41,

47 (5th Cir. 1980) (reversing and remanding for further factual development because runoff from spoil basins could constitute discharges from a point source).[6]

In this case, Plaintiff alleges that "[c]ontaminated leachate from the landfill is discharged from the landfill to groundwater where it then flows from a spring adjacent to the landfill into Cypress Creek." (Doc. 16, ¶ 26.) In *Parker* and *Abston Construction*, piles of industrial and mining debris were found to be point sources; the pile of trash that constitutes the Landfill may also be a point source. In light of the fact that the term "point source" is defined broadly in the Eleventh Circuit, and such a determination is fact-laden, the Landfill may constitute a point source under the CWA. At this stage, the Court does not hold that the Landfill is a point source, but it is inappropriate to dismiss the claim on this basis at this early stage in the litigation.

2. Navigable Water

Next, HGH contends that the groundwater beneath the Landfill cannot be a navigable water of the United States. The definition of "navigable water" has been hotly disputed in many cases and fractured the United States Supreme Court in *Rapanos v. United States*, 547 U.S. 715., 716. The plurality opinion by Justice Scalia

[6] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

would find CWA jurisdiction over "only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right." *Id.* at 717. Justice Kennedy, in his concurrence, proposed a different test, commonly called the significant nexus test: "[A] water can be considered 'navigable' under the CWA only if it possesses a 'significant nexus' to waters that 'are or were navigable in fact or that could reasonably be so made.'" *United States v. Robison*, 505 F.3d 1208, 1222 (11th Cir. 2007) (quoting *Rapanos v. United States*, 547 U.S. 715, 759 (2006) (Kennedy, J., concurring)). A water meets the "significant nexus" test if, "either alone or in combination with similarly situated lands in the region, [it] significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Rapanos*, 547 U.S. at 780. Justice Stevens' dissent stated that the four Justices who signed it would find jurisdiction whenever either test was met. *Id.* at 810.

In *United States v. Robison*, the Eleventh Circuit discussed Rapanos at length and adopted Justice Kennedy's "substantial nexus" test. 505 F.3d at 1215-24. The Court of Appeals stated that it must take as the Supreme Court's holding the narrowest ground on which a majority of justices concurred, and it found that ground to be Justice Kennedy's test. *Id.* at 1220-21 (citing *Marks v. United States*, 430 U.S. 188, 193

(1977) *and United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725-25. While other courts have followed Justice Stevens invitation to create a majority with the four dissenters wherever either test is met, (*see United States v. Johnson*, 467 F.3d 56, 64 (1st Cir. 2006)) the Eleventh Circuit soundly rejected this approach, noting that *Marks* directs the court to follow the narrowest holding among only those Justices who concurred in the judgment. *Robison*, 505 F.3d at 1221. In *Robison*, the Court of Appeals' adoption of the substantial nexus test rendered the District Court's jury instruction incorrect, because the instruction had relied upon a surface water connection between the point source and navigable waterways. 505 F.3d at 1222-23.

In this case, Riverkeeper will eventually have to demonstrate the existence of a substantial nexus between the landfill and navigable waterways. Its complaint alleges that a portion of the connection between the two lies underground. (Doc. 16 ¶ 26.) According to Plaintiff's complaint, the groundwater affected by the pollutants has a "direct hydrological connection" to Cypress Creek and the Tennessee River. (Doc. 16, ¶ 28.) "Contaminated leachate from the landfill is discharged from the landfill to groundwater where it then flows from a spring adjacent to the landfill into Cypress Creek." (Doc. 16, ¶ 26.) This raises a question that the Eleventh Circuit has not directly addressed–whether hydrologically connected groundwater should be subject

to the CWA. Although HGH correctly notes that Congress did not intend for the CWA to extend to isolated groundwater, *see Exxon Corp. v. Train*, 554 F.2d 1310, 1318 (5th Cir. 1977), courts in other circuits have held that "any pollutant which enters such waters, whether directly or through groundwater, is subject to regulation." *Washington Wilderness Coalition v. Hecla Mining Co.*, 870 F. Supp. 983, 990 (E.D. Wash 1994); *see also Quivira Mining Co. v. United States Envtl. Protection Agency*, 765 F.2d 126, 129 (10th Cir. 1985); *and Sierra Club v. Colorado Refining Co.*, 838 F. Supp. 1428, 1434 (D. Colo. 1993).

The closest binding precedent on this issue comes from the former Fifth Circuit, but in *Train*, the Court of Appeals noted that it was not faced with the issue of whether wastes that migrate from groundwater into surface water were within the CWA's jurisdiction. 554 F.2d at 1312 n.1. Although the extension of the CWA to hydrologically connected groundwater has not been universal, *see Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994), the Court believes that Eleventh Circuit precedent points to the idea that groundwater may be covered by the CWA if the claiming party can prove a substantial nexus.

On a motion to dismiss, the question is not whether a plaintiff has proven a particular point, but whether it has properly alleged it. To determine whether this is

the case, the court must apply the two-pronged analysis from Iqbal, disregarding conclusory legal statements but assuming the truth of well-pled facts to determine if they plausibly allege a violation. *American Dental Ass'n v. Cigna Corp.*, 605 F.3d at 1290 (citing *Iqbal*, 129 S. Ct. at 1950). Here Riverkeeper has alleged that leachate containing high levels of pollutants, including "debris, oil, scum, sediment, foam and other materials attributable to sewage and/or industrial wastes" (Doc. 16, ¶ 33) have been discharged from the landfill to groundwater. (*Id.*, ¶ 26.) It has alleged that this groundwater flows into Cypress Creek from a specified point, a spring identified in the complaint by latitude and longitude. *Id.* The Complaint also states that these contaminants "can significantly affect the chemical, physical, and biological integrity of Cypress Creek." (Doc. 16, ¶ 31.) This formulation correctly addresses the substantial nexus test, but it may properly be considered a legal conclusion that is not effective to state a claim.

The Plaintiffs, however, allege other facts that may plausibly state a claim even as the Court disregards this conclusory statement. In addition to the description of the hydrological connection noted above, the Complaint alleges that laboratory analyses "of the contaminated leachate discharged from the Old Florence Landfill," show the presence of pollutants, and it lists specified dates that such discharges were observed.

(Doc. 16 ¶ 32.) It fails to specify in these paragraphs where those pollutants were present and what effect they were having on the navigable waters. Elsewhere in the complaint, however, the Plaintiff does allege specific effects on Cypress Creek and the Tennessee River, each of which are alleged to be navigable in fact. (Doc. 16, ¶ 31.) For example, the Complaint alleges that the pollutants have diminished aquatic life in the nearby waters, making them less suitable for fishing and observing nature. (Doc. 16, ¶ 10.) Taking these facts together as true, the Plaintiff alleges that the Landfill has discharged measurable (and recently measured) levels of pollutants including oil, foam, and scum from municipal waste into water that is hydrologically connected to navigable waters, thus causing a decline in aquatic life in those waters. The Court believes that this plausibly alleges that the pollution has an effect on the biological integrity of navigable waters, and thus alleges a substantial nexus as required by *Robison*. 505 F.3d at 1221. Therefore, dismissal of the CWA claim on this ground is inappropriate.

3. Wholly Past

HGH's final argument with respect to the CWA is that any violations are "wholly past" and are therefore not actionable. In *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, the Supreme Court held that Congress did not intend to

permit citizen suits for "wholly past" violations of the CWA based on its use of the phrase "in violation." 484 U.S. 49, 57 (1987). Instead, the CWA requires a plaintiff to allege continuous or intermittent violations in order to establish jurisdiction. *Id.* In other words, it must allege that there is a reasonable likelihood that a past polluter will continue to pollute in the future. *Id.* HGH contends that, based on the *Gwaltney* decision, there is no ongoing violation and no basis for a claim under the CWA where the alleged discharge is a result of past pollution.

Citizen-plaintiffs need not prove their allegations of ongoing violations for the purposes of stating a claim under the CWA. Instead, a good faith allegation of violations that are ongoing at the time the suit is filed is sufficient for jurisdictional purposes. *Atl. States Legal Found. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1133 (11th Cir. 1990). Here, Plaintiff has alleged that the CWA violations are ongoing because the Landfill is continuing to discharge pollutants that eventually make their way to the Tennessee River and its tributaries. (Doc. 16, ¶ 33-34.) Plaintiff's allegations do not deal with the manner in which waste was placed in the Landfill, but rather allege that the Landfill itself is currently discharging pollutants. *Id.* Therefore, the violations complained of cannot be "wholly past."

Related to HGH's argument that its violations are "wholly past" is the idea that its status as a subsequent purchaser and passive landowner should shield it from liability under the CWA. HGH does not explicitly make this argument in its submission to the Court, but it does describe itself as "a passive owner of the Landfill who bought the property long after the Landfill was closed and never disposed of any waste or anything at all at the Landfill." (Doc 20 at 14). The Eleventh Circuit has not addressed whether CWA liability attaches to subsequent purchasers who do nothing but own the land. In *Parker*, the property had changed hands, but the scrap metal business was continued by the new owners. 386 F.3d at 1001. Among other circuits, there appears to be a split on the issue. *Compare Froebel v. Meyer*, 217 F.3d 928, 938 (7th Cir. 2000) *with Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1143-44 (10th Cir. 2005). Plaintiff has alleged that violations continue from the Landfill, and HGH has presented no significant argument on this issue other than that the violations are wholly past. Therefore, the Court denies HGH's motion to dismiss this claim.

C. RCRA Claim

HGH next contends that Plaintiff failed to allege facts demonstrating that it was operating an "open dump" under the RCRA. The RCRA prohibits "any solid waste management practice or disposal of solid waste or hazardous waste which constitutes

the open dumping of solid waste or hazardous waste . . . ." 42 U.S.C. § 6945(a). Before turning to the definition of an open dump, the Court notes that HGH has not undertaken any solid waste management practice at the Landfill. The statute, however, also prohibits "disposal of solid waste" *Id.* The statute defines the term disposal to mean "the discharge, deposit, injection, dumping, spilling, *leaking,* or placing of any solid waste or hazard waste into or on any land or water." 42 U.S.C. § 6903(3) (emphasis added). Because Riverkeeper has alleged that waste materials continue to leak from the Landfill into water, a violation of the statute is alleged if the Landfill meets the definition of open dump.

The term "open dump" is defined as "any facility or site where solid waste is disposed of which is not a sanitary landfill which meets the criteria [for sanitary landfills] and which is not a facility for disposal of hazardous waste." 42 U.S.C. § 6903(14). The terms "open dump" and "open dumping" are treated the same under the RCRA. *S. Rd. Assocs. v. Int'l Bus. Machs. Corp.*, 216 F.3d 251, 255 n.3 (2nd Cir. 2000). The Environmental Protection Agency has created an additional definition of open dump in regulations it has issued interpreting the RCRA. See 40 C.F.R. Part 257 (defining an open dump as any facility that violates the regulations in that part). Here, Plaintiff alleges that the Landfill constitutes an open dump because it violates 40

C.F.R. 257.3-3, barring the discharge of pollutants into water in violation of the CWA. (Doc. 16, ¶ 45). As noted above, the Court believes Plaintiff has properly alleged such a violation, and that it has alleged the violation is ongoing.

District Courts in the Eleventh Circuit have noted that the Court of Appeals "has not addressed the issue of whether the continued presence of migrating wastes constitutes a continuing violation under the RCRA." *Scarlett & Assoc., Inc., v. Briarcliff Center Partners, LLC*, 2009 WL 3151089, at *10 (N.D. Ga. 2009) (citing *Cameron v. Peach County*, 2004 WL 5520003 at *27 (M.D. Ga. 2004). Both *Scarlett* and *Cameron* found that migrating waste could be a continuing violation, and *Scarlett* characterized this position as the "majority rule." *Scarlett*, 2009 WL 3151089 at *10; *Cameron*, 2004 WL 5520003 at *27. Most of the cases cited as part of this majority refer to the fact that the waste was dumped illegally to begin with. *See e.g., Gache v. Town of Harrison*, 813 F. Supp. 1037, 1041 S.D.N.Y. 1993); *See Williams v. Ala. Dept. of Transp.*, 119 F. Supp. 2d 1249, 1255 (M.D. Ala. 2000) ("courts have found that the continued presence of illegally dumped materials constitutes a continuing violation of RCRA").

In this case, it appears that the waste deposited in the Old Florence Landfill prior to 1987 may not have been dumped illegally. However, the dumping of the waste

in the Landfill is not the violation that Riverkeeper alleges in its Complaint. Rather, read in the light most favorable to the Plaintiff, the Complaint claims that the Defendant currently maintains an open dump because the disposal of waste is ongoing through the leaching of water through the Landfill. This disposal occurs every time material leaks out of the Landfill into the groundwater, because both the RCRA and the EPA regulations implementing it define the term disposal to include "leaking . . . into or on any land or water." 42 U.S.C. § 6903(3); 40 C.F.R. § 257.2. The Court can find nothing in the statute or the regulations requiring active participation by the violating party in this disposal. The statute simply prohibits any disposal that constitutes open dumping, while the regulations demonstrate that a disposal involving a discharge of pollutants in violation of the CWA constitutes open dumping.[7] Since the Court has found that Plaintiffs allege a plausible claim under the CWA, it likewise finds that Defendants motion to dismiss the RCRA claim should be denied.

The Court is concerned, however, about the possibility that the Old Florence Landfill is a Municipal Solid Waste Landfill ("MSWLF") under the RCRA. *See* 40

[7]It should be noted that, in other parts of the RCRA, Congress allowed suit only against a party "who has contributed or who is contributing to the past or present handling, storage, treatment, transportation or disposal of any solid or hazardous waste." 42 U.S.C. §6972(a)(1)(B). The lack of any such language in the open dumping section or its regulations indicates that "contributing" to the disposal is not required to be in violation of that section.

C.F.R. § 257.2. If it is a MSWLF, then the regulations in C.F.R. Part 257 do not apply (40 C.F.R. § 257.1(c)(10)), and the Landfill is instead covered by C.F.R. Part 258, which, by its terms, does not apply to any facility that did not receive waste after October 9, 1991. 40 C.F.R. § 258.1(c). The regulations define MSWLF in a technical manner which excludes specific types of waste that may or may not be present in the Landfill. See 40 C.F.R. § 257.2. The Court thus cannot resolve this issue at the present stage, because it requires facts well beyond the pleadings.

V. Motion to Dismiss Under Rule 12(b)(7)

HGH's final argument is that Plaintiff failed to join an indispensable party to this action. Under Federal Rule of Civil Procedure 12(b)(7), a person must be joined as a party to the suit if "in that person's absence, the court cannot accord complete relief among existing parties." Fed. R. Civ. P. 12(b)(7). In determining whether a party should be joined, the Court should consider "pragmatic concerns, especially the effect on the parties and the litigation . . . ." *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1280 (11th Cir. 2003). HGH bears the burden of showing that the case should not proceed. *Molinos Valle Del Ciabo v. Lama*, 633 F.3d 1330, 1347 (11th Cir. 2011).

Here, HGH argues that the pollutants at issue are being introduced into the

Tennessee River through a natural spring located on property it does not own. In order to dismiss under 12(b)(7), HGH must show that the relief sought by Riverkeeper cannot be accorded without the participation of the neighboring landowner. No such showing can be made here. According to Plaintiff's allegations, pollutants are entering the groundwater on HGH's property and the water that eventually flows from the spring is already polluted before moving onto the neighbor's property. If these allegations are true, an injunction requiring HGH to clean the Landfill would likely remedy Plaintiff's injuries. Therefore, the Court does not need the presence of the neighboring landowner to adjudicate this dispute. Accordingly, HGH's motion to dismiss pursuant to Rule 12(b)(7) is due to be denied.

VI. Conclusion

For the reasons discussed herein, Defendant's motion to dismiss (Doc. 19) is DENIED.

Done this 20th day of August 2013.

L. Scott Coogler

United States District Judge
[160704]

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of September 2017, the foregoing document was served on counsel of record through the CM/ECF system at the email addresses indicated below.

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I further certify that on this 29th day of September 2017, I caused the required copies of the Reply Brief to be hand filed with the Clerk of the Court.

/s/ Frank S. Holleman, III

Attorney for Plaintiffs-Appellants