17-1640

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UPSTATE FOREVER and SAVANNAH RIVERKEEPER,

Plaintiffs-Appellants,

v.

KINDER MORGAN ENERGY PARTNERS, LP and
PLANTATION PIPE LINE COMPANY, INC.

Defendants-Appellees.

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

BRIEF OF AMICUS CURIAE PIPELINE SAFETY TRUST IN SUPPORT OF PLAINTIFFS-APPELLANTS' APPEAL SEEKING REVERSAL

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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Pipeline Safety Trust
(name of party/amicus)

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If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Catherine H. McElveen Date: July 19, 2017

Counsel for: Pipeline Safety Trust, Amicus Curiae

CERTIFICATE OF SERVICE

****

I certify that on July 19, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Catherine H. McElveen
(signature)

July 19, 2017
(date)

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INTEREST OF AMICUS CURIAE[1]

On June 10, 1999, a 16-inch diameter steel gasoline pipeline owned by Olympic Pipeline Company ruptured and released approximately 237,000 gallons of gasoline into a creek that flowed through a park in Bellingham, Washington, killing two 10-year old boys and an 18-year old young man. The families of the 3 boys who were killed in the fire joined other community members to form a group with two main purposes: (1) ensuring that the Olympic Pipeline was safe before it was allowed to restart; and (2) improving the safety of pipelines nationwide so that no other communities would have to endure the pain, suffering, and environmental damage caused by preventable pipeline failures.

As a result of the tragic Bellingham rupture and explosion, Amicus Curiae, Pipeline Safety Trust (the "Trust"), was created in 2003. The Trust was formed with funds set aside to establish a permanent, independent pipeline safety watchdog group by order of the Honorable Judge Barbara Rothstein, district court judge for the Western District of Washington, as part of a plea agreement on the criminal penalties paid by the pipeline's operators.[2] The Trust exists because of a failure in the pipeline

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and no person—other than amicus curiae, its members, or its counsel—contributed money that was intended to fund the preparation or submission of this brief.

[2] *See* Hr'g Trs., *United States v. Olympic Pipe Line Co.*, Case No. 2:01-cr-338-BJR, Dkt. Nos. 229–31 (W.D. Wash. June 18, 2003) (transcripts of sentencing hearings).

safety regulatory system and an operator's actions that resulted, as in this case, in a hazardous liquid pipeline discharging gasoline that made its way to the waters of a creek.

Since its founding in 2003, the Trust has regularly testified before Congress on pipeline safety issues, educated local governments and individuals with concerns about the safety of pipelines in their communities, and worked closely with industry, regulators, and the public to improve pipeline safety regulations and their effectiveness.[3] This case marks only the second time the Trust has participated in litigation in its 14-year history—both times to support the continued legitimacy of citizen enforcement provisions in statutes enacted to protect public health and safety.[4]

The Trust's Board of Directors chose to participate as amicus curiae here because the outcome of this case may impact the ability of the Trust and others to effectively enforce the Clean Water Act's ("CWA" or the "Act") prohibition against discharging pollutants into the nation's waters.

[3] The Trust maintains a website containing examples of its work at www.pstrust.org.
[4] In 2013, the Trust filed an amicus curiae brief in support of the City and County of San Francisco for the purpose of preventing or remedying future pipeline failures by ensuring enforcement of existing pipeline safety laws. *See* Br. of Amicus Curiae Pipeline Safety Trust, *City & Cty. of S.F. v. U.S. Dep't of Transp.*, No. 2013-15855 (W.D. Wash. Oct. 16, 2013), ECF No. 16.

This amicus brief provides additional support to the arguments raised in Plaintiffs-Appellants' Opening Brief. The Trust also seeks to familiarize the Court with the frequency and consequences of pipeline failures and to heighten the Court's awareness of the critical importance of holding operators accountable. The citizen suit provision of the Clean Water Act exists for exactly this purpose. The Trust's interest is to protect this statutory right. The Trust is authorized by its Board of Directors to file this brief.

I. INTRODUCTION AND BACKGROUND

A. Catastrophic Pipeline Incidents Occur With Frightening Regularity and Cost Millions of Dollars to Clean Up and Repair

A significant pipeline incident occurs in the United States, on average, three out of every four days.[5] Hazardous liquid pipelines account for nearly half of those incidents, occurring an average of four out of every ten days and causing an average

[5] "Significant" incidents are those reported by pipeline operators when any of the following specifically defined consequences occur:

1. fatality or injury requiring in-patient hospitalization;
2. $50,000 or more in total costs, measured in 1984 dollars;
3. highly volatile liquid releases of 5 barrels or more or other liquid releases of 50 barrels or more; or
4. liquid releases resulting in an unintentional fire or explosion.

Significant Pipeline Incidents, U.S. Dep't of Transp., available at, https://www.phmsa.dot.gov/pipeline/library/data-stats/pipelineincidenttrends (10 year average) (last visited July 7, 2017).

of $275 million in property damage annually for the past ten years. Even more troubling is the fact that the frequency of significant incidents has continued to increase in recent years, despite the imposition of stronger integrity management rules that went into effect in the mid-2000s.[6]

In fact, the frequency of significant incidents on hazardous liquid pipelines has continued to increase since the 2008 and 2009 regulatory deadlines for the completion of the first full integrity management assessments. Data collected by the U.S. Department of Transportation Pipeline and Hazardous Materials Safety Administration ("PHMSA") shows a distressingly steady increase in the number of

[6] The 1999 Olympic Pipeline failure in Bellingham occurred at a flaw in the pipeline identifiable by an in-line inspection tool. In 2000, the El Paso Natural Gas Pipeline failed in Carlsbad, New Mexico due to internal corrosion to the pipeline, killing a family of 12 who were camping nearby. At the time of these incidents, federal pipeline safety regulations did not require operators to inspect any part of their pipelines, anywhere, ever. *See generally*, Carol Parker, *The Pipeline Industry Meets Grief Unimaginable: Congress Reacts with the Pipeline Safety Improvement Act of 2002*, 44 NATURAL RES. J. 243 (2004). Congress and federal regulators responded to these horrific incidents, and a record year of pipeline failures, by imposing new rules on natural gas and hazardous liquid pipelines, with the intention of making pipelines safer by requiring pipelines that are located in areas of high population or particular environmental sensitivities to be regularly inspected, maintained, and repaired. *Id.*

significant incidents over the past 10 years as depicted in a graph reproduced from the agency's website.[7] *See* PHMSA graph attached hereto as **Ex. A**.[8]

Pipeline failures are costly, tragic, and worst of all, often preventable. In the past 10 years, more than 75% of the significant incidents on hazardous liquid lines are from causes within the control of the operator, including incorrect operation, corrosion, and the failure of welds, material and equipment. *See* PHMSA pie chart attached hereto as **Ex. B**.

During the past ten years, operators recovered, on average, only 54,000 of the 83,000 barrels spilled annually, resulting in more than a million gallons of hazardous liquid spilled from pipelines remaining in the environment.[9] That remaining volume of hazardous liquid threatens drinking water supplies, fisheries, wildlife, beaches, and public health.

As reported by the National Transportation Safety Board ("NTSB") in 1997, a single pipeline accident "can injure hundreds of persons, affect thousands more,

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[7] Data stored in the PHMSA's Pipeline Datamart database, accessible through the link to Significant Incident 20 year Trends: https://www.phmsa.dot.gov/pipeline/library/data-stats/pipelineincidenttrends (Hazardous Liquid 20 year trends) (last visited July 14, 2017).

[8] This Court may consider publicly available information in reviewing a motion to dismiss. *See Philips v. Pitt Cty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009).

[9] Data stored in the PHMSA's Pipeline Datamart database, accessible through the link to Significant Incident 20 Year Trends: https://www.phmsa.dot.gov/pipeline/library/data-stats/pipelineincidenttrends (10 year average) (last visited July 7, 2017).

and cost millions of dollars in . . . property damage, loss of work opportunity, community disruption, ecological damage, and insurance liability."[10] Unfortunately, that record has failed to improve. More recently, the costs of the continuing cleanup following the 2010 failure of Enbridge's Line 6b into Talmadge Creek and the Kalamazoo River near Marshall, Michigan have exceeded $1 billion, according to Enbridge's disclosure in an Application for a Certificate of Need before the Minnesota Public Utilities Commission.[11]

The current regulatory scheme, including pipeline safety regulations and spill prevention planning regulations, are insufficient incentives for the industry to reduce the frequency and severity of hazardous liquid pipeline spills. As demonstrated below, courts have recognized the critical importance of the CWA's citizen suit provision in preventing the release of pollutants from point sources such as pipelines.

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[10] NATIONAL TRANSPORTATION SAFETY BOARD, SAFETY STUDY-PROTECTING PUBLIC SAFETY THROUGH EXCAVATION DAMAGE PREVENTION 1 (1997).

[11] *Application for a Certificate of Need for a Crude Oil Pipeline*, Enbridge Energy, at 61 (rev. Aug. 16, 2013), available at, https://www.edockets.state.mn.us/EFiling/edockets/searchDocuments.do?method=showPoup&documentId=%7bF1B13575-3D71-4CAA-A86A-05CE1EBBCA38%7d&documentTitle=20138-90363-03 (last visited Sept. 28, 2013).

B. The Importance of the Clean Water Act and the Clean Water Act's Citizen Suit Provision

In 1972, Congress enacted the Clean Water Act in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," with the stated goal of eliminating "the discharge of pollutants into the navigable waters." 33 U.S.C. § 1251(a); § 1251(a)(1). Importantly, the Clean Water Act also includes a "citizen suit provision" which encourages public participation in the development, revision, and enforcement of any regulation, standard, plan, or program, etc. 33 U.S.C. § 1251(e). This Court and district courts within this Circuit have recognized the importance of this provision.

"The clear intent of the citizen suit provision is to provide for private enforcement of standards, limitations and orders which state and federal authorities have declined to enforce." *Md. Waste Coal. v. SCM Corp.*, 616 F. Supp. 1474, 1483 (D. Md. 1985). "Although the primary responsibility for enforcement rests with the state and federal governments, private citizens provide a second level of enforcement and can serve as a check to ensure the state and federal governments are diligent in prosecuting Clean Water Act violations." *Piney Run Pres. Ass'n v. Cty. Comm'rs of Carroll Cty., Md.*, 523 F.3d 453, 456 (4th Cir. 2008).

This Court has "recognized that this citizen suit provision is 'critical' to the enforcement of the CWA, as it allows citizens to abate pollution when the government cannot or will not command compliance[.]" *Id.* (internal citations and

quotations omitted). "It reflects Congress's recognition that citizens can be a useful instrument for detecting violations and bringing them to the attention of the enforcement agencies and courts alike." *Ohio Valley Envtl. Coal., Inc. v. Hobet Mining, LLC*, 723 F. Supp. 2d 886, 902 (S.D.W.Va. 2010) (internal quotations omitted).

"An essential element in any control program involving the nation's waters is public participation. The public must have a genuine opportunity to speak on the issue of protection of its waters. . . . The scrutiny of the public . . . is extremely important in insuring expeditious implementation of the authority and a high level of performance by all levels of government and discharge sources.")." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 890 F. Supp. 470, 487 (D.S.C. 1995) (quoting S. Rep. No. 414, 92d Cong. 1st Sess. 64, at 72 (1971), *reprinted in* 1972 U.S.C.C.A.N. at 3738)).

The importance of the continued availability of the citizens' right to enforce the provisions of the Clean Water Act is apparent.

C. The Plantation Pipeline Spill

Appellee-Defendant Kinder Morgan Energy Partners, L.P. is the largest petroleum pipeline and energy infrastructure company in the United States, owning an interest in or operating approximately 84,000 miles of pipelines in North America. App. 6-7, ¶ 3. Plantation Pipe Line Company, Inc. is a subsidiary of

Kinder Morgan Energy Partners, L.P. and owns the Plantation Pipeline. App. 7, ¶ 4.[12] The Plantation Pipeline carries over 20 million gallons of petroleum each day, cutting a 1,100 mile path from Louisiana to Washington, D.C. *Id.*

In their Complaint (the "Complaint"), Plaintiffs-Appellants Upstate Forever and Savannah Riverkeeper (the "Conservation Groups") have alleged that the Plantation Pipeline spill that is at issue in this case is one of the largest pipeline spills in South Carolina history. App. 6, ¶ 1. The Conservation Groups have stated that, as a result of this rupture, over 369,000 gallons of gasoline spilled into the environment, resulting in a devastating impact on the community and surrounding waterways and wetlands. *See* App. 7, ¶ 6; App. 7-11, ¶¶ 7, 9, 10, 11-13, 15-18, 21-25, 27. According to the Complaint, at the commencement of the underlying action, over 160,000 gallons of gasoline remained unrecovered. App. 7, ¶ 9.

The Conservation Groups have alleged that this pipeline spill occurred extremely close to two waterways of the United States that are protected by the Act—Browns Creek (1,000 feet from the rupture site) and Cupboard Creek (400 feet from the rupture site).[13] App. 9, ¶ 11; App. 19, ¶ 55. The Complaint provides that, because these waterways are downgradient of the Plantation Pipeline rupture site,

[12] Defendants-Appellees Kinder Morgan Energy Partners, L.P. and Plantation Pipeline Company, Inc. are collectively referred to herein as "Kinder Morgan."

[13] Browns Creek and Cupboard Creek are part of the Savannah River Basin, flowing through Broadway Lake, Lake Secession, Lake Russell, and ultimately into the Savannah River. App. 8, ¶¶ 11-12.

they are in the pathway of groundwater flowing from the rupture. App. 8, ¶ 11. The Conservation Groups have stated that, as a result, gasoline and gasoline pollutants have flowed, are currently flowing, and will continue to flow into Browns Creek via the ground, ground surface, groundwater, and seeps emerging from the ground surface that flow into the waterway. App. 8-9, ¶¶ 16-17; App. 19, ¶¶ 54-55.[14]

The Conservation Groups have also included allegations in their Complaint relating to Kinder Morgan's conduct since the Plantation Pipeline spill. For example, the Conservation Groups allege that: (1) Since the Plantation Pipeline rupture, Kinder Morgan has repeatedly resisted testing requests, has not adequately recovered the gasoline and gasoline pollutants, and has negligently maintained booms placed in Browns Creek to remove gasoline pollution, s*ee, e.g.*, App. 10, ¶ 20; App. 14, ¶ 35; App. 7, ¶ 9; App. 9-10, ¶ 21; (2) A comprehensive site assessment was delayed for six months, and Kinder Morgan failed to meet the March 2016 submission deadline set by DHEC for its corrective action plan, App. 14, ¶ 35; (3) Once Kinder Morgan finally submitted its corrective action plan in September 2016, it was widely criticized by Anderson County and members of the public, App. 14, ¶ 36, as the plan failed to include adequate monitoring and groundwater treatment

[14] The Complaint states that Kinder Morgan has reported that, among other conveyances from the rupture site to Browns Creek, there are two large unpermitted streams of contaminated water measuring 30 feet by 12 feet and 12 by 12 feet, with each impacting surface water quality. *See* App. 288, 315-22.

strategies to prevent the continued pollution of the waterways, App. 14, ¶ 37; and, (4) Kinder Morgan also proposed in its plan that it not be required to continue repair and cleanup of the site, and that it be permitted to continue to discharge gasoline pollutants into the waterway. *Id.*

D. The Underlying Action

As a result of Kinder Morgan's failure to control the Plantation Pipeline spill and failure to ensure the effectiveness of future recovery and remediation efforts, the Conservation Groups initiated the underlying action on December 28, 2016, after providing the requisite 60-day notice to Kinder Morgan, the South Carolina Department of Health and Environmental Control ("DHEC"), and the U.S. Environmental Protection Agency ("EPA"). App. 6-25.

In their Complaint, the Conservation Groups allege that the Plantation Pipeline rupture has resulted in the impermissible discharge of gasoline and gasoline pollutants into the waters of the United States over and through the land, as well as through flows, seeps, and fissures, and by the pollution of surface water through groundwater that has a direct hydrologic connection to the surface water. App. 19, ¶ 54; App. 22-23, ¶¶ 54, 64-70.

Kinder Morgan filed a motion to dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) on February 17, 2017. On April 20, 2017, the District Court granted Kinder Morgan's motion based on the grounds that are presented to this Court for review

by the Conservation Groups. App. 410-26. Namely, the District Court ruled that the Plantation Pipeline is not a "point source" because the pipeline was patched. App. 411, 416. The District Court determined that there was no violation of the CWA because there was not a "direct" discharge of gasoline or gasoline pollutants from the Plantation Pipeline into the creek, and pollutants that move a short distance through and over land and through groundwater to the creek are nonpoint source pollutants that are not covered by the CWA. App. 417-19. The District Court also found that the CWA "does not protect against pollution discharges from a point source to surrounding surface waters conveyed by groundwater that has a direct hydrological connection to the surface waters." Conservation Group's Opening Br. 8 (July 12, 2017), ECF 14 (citing App. 421-25).

II. ARGUMENT

As mentioned above, the Pipeline Safety Trust was formed for the purpose of improving the safety of pipelines nationwide so that no other communities would have to endure the pain, suffering, and environmental damage caused by preventable pipeline failures. Accordingly, the Pipeline Safety Trust has a substantial interest in seeing that the CWA and its provisions are followed by pipeline owners and operators and correctly applied and upheld in courts of law.

If this Court were to uphold the District Court's decision in the underlying action, it would run contrary to both the stated purpose of the CWA and the opinions

of this Court and other Courts of Appeal and district courts across the United States. Accordingly, the District Court's dismissal of this case should be reversed.

A. The District Court's Ruling Ignores the Express Terms of the Clean Water Act and Relevant Case Law

1. The Clean Water Act Does Not Require a "Direct" Discharge

The District Court ruled that there was no violation of the CWA in this case because the Plantation Pipeline was no longer actively leaking, and there was not any "direct" discharge of gasoline or gasoline pollutants from the Plantation Pipeline into the creek. App. 417-19. The District Court incorrectly reasoned that there was no violation of the CWA in this case because pollutants that move a short distance through and over land and through groundwater to the creek are nonpoint source pollutants not covered by the CWA. This ruling is contrary to the express terms of the CWA and case law interpreting the CWA.

As stated above, under 33 U.S.C. § 1365(a)(1), a citizen enforcement action may be brought against any person alleged to be "in violation of" the Act's provisions. As correctly recognized by the District Court and as expressly defined by the CWA, the Plantation Pipeline is a "point source." *See* App. 416; 33 U.S.C. § 1362(14) (defining point source as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure . . . from which pollutants are or may be discharged.").

A party is deemed to be "in violation of" the CWA if there is an impermissible "discharge," which is defined as "any addition of any pollutant to navigable waters" from any point source. 33 U.S.C. § 1362(12). This Court has interpreted the "in violation of" language contained in the CWA to include continuous or ongoing contamination, even if a defendant's conduct that is causing the violation has stopped. *Goldfarb v. Mayor and City Council of Balt.*, 791 F.3d 500, 513 (4th Cir. 2015).

In *Goldfarb*, the plaintiff's complaint asserted "specific, identifiable actions attributed to the [defendant] that allegedly violated RCRA-based mandates, have gone uncorrected, and continue unabated such that the [defendant] is still 'in violation of' those mandates." *Id.* at 513. Because this Court had only "briefly touched" on RCRA's "in violation of" language, the Court applied the Supreme Court and Second Circuit Court of Appeals' interpretation of identical "in violation of" language contained in the CWA.

> [T]he Supreme Court interpreted identical language in the CWA to require that for the alleged harm to be cognizable, it must "lie[] in the present or future, not in the past." That is to say, "to be in violation" does not cover "[w]holly past actions," but rather requires allegations of a "continuous or intermittent violation."

Id. (quoting *Gwaltney of Smithfield v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57, 59 (1987) (internal citations omitted)). This Court recognized that other courts of appeal have relied on the Supreme Court's interpretation of the CWA's language

to reach the same conclusion. *Id.* (citing *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1010 n.20 (11th Cir. 2004) (interpreting RCRA's "in violation of" requirement under *Gwaltney* to require "a continuous or ongoing violation . . . for liability to attach"); *Conn. Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.*, 989 F.2d 1305, 1315-16 (2d Cir. 1993) (same)).

> This Court continued, agreeing with the Second Circuit's view that the
>
> "to be in violation of" language does not necessarily require that a defendant be currently engaged in the activity causing the continuous or ongoing violation. Rather, the proper inquiry centers on "whether the defendant's actions—past or present—cause an ongoing violation. . . ." In other words, although a defendant's *conduct* that is causing a *violation* may have ceased in the past, . . . what is relevant is that the *violation* is continuous or ongoing.

Id. (internal citations omitted); *see also 307 Campostella, LLC v. Mullane*, 143 F. Supp. 3d 407, 413 (E.D. Va. 2015) (citing *Goldfarb*, and finding that, "While the violation must be continuous or ongoing, however, the defendant's conduct causing the violation need not be ongoing.").

Further, as a district court within this Circuit recognized, "the Fourth Circuit has stated, albeit not in the context of a citizen suit, that 'each day the pollutant remains in the wetlands without a permit constitutes an additional day of violation' of Section 301 of the Clean Water Act." *Ohio Valley Env't Coal., Inc. v. Hernshaw Partners, LLC*, 984 F. Supp. 2d 589, 597 (S.D.W. Va. 2013) (quoting *Sasser v. Adm'r, U.S. E.P.A.*, 990 F.2d 127, 129 (4th Cir. 1993)). The *Ohio Valley* court

adopted the reasoning in *North Carolina Wildlife Fed'n v. Woodbury*, No. 87-584-CIV-5, 1989 WL 106517, at *1-2 (E.D.N.C. Apr. 25, 1989), which involved discharges from dredging activities that had ceased six years before the filing of the lawsuit:

> The phrase in § 505(a), "to be in violation," unlike the phrase "to be violating" or "to have committed a violation," suggests a state rather than an act—the opposite of a state of compliance. A good or lucky day is not a state of compliance. Nor is the dubious state in which a past effluent problem is not recurring at the moment but the cause of that problem has not been completely and clearly eradicated. When a company has violated an effluent standard or limitation, it remains, for the purposes of § 505(a), "in violation" of that standard or limitation so long as it has not put in place remedial measures that clearly eliminate the cause of the violation.

Ohio Valley, 984 F. Supp. 2d at 597-98 (citing *Woodbury*, 1989 WL 106517, at *2 (quoting *Gwaltney*, 484 U.S. at 69 (1987)). Accordingly, the court found that "one may continue to be in violation of the Clean Water Act even if the activities that caused the violations have ceased." *Id.* at 598 (collecting cases).

To the extent that Kinder Morgan's impermissible discharge of gasoline and gasoline pollutants continues to flow into the waterway, Kinder Morgan remains "in violation of" the CWA.

The District Court also incorrectly found that there was no violation of the CWA in this case because pollutants that move a short distance through and over land and through groundwater to the creek are nonpoint source pollutants not covered by the CWA. As set forth in the Conservation Group's Opening Brief,

courts "have broadly interpreted the term point source" to encompass "all pollution that comes from a confined system," even though no pipe or manmade device "carried the pollutants from the confined system or collection point to the navigable waters." *See, e.g.*, Conservation Group's Opening Br. 24 (citing *Friends of the Sakonnet v. Dutra*, 738 F. Supp. 623, 629-30 (D.R.I. 1990)). The Conservation Group's Opening Brief also explains that the U.S. Department of Justice and the EPA recently told the Ninth Circuit that "courts have interpreted the term 'discharge of a pollutant' to cover discharges over the ground and by other means" including transmission through groundwater. *Id.* at 23; *see also id.* at 23-25 (collecting cases).

The language of the CWA broadly defines the "discharge of any pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §§ 1311, 1362(12)(A). There is no limiting language that provides that the CWA only applies to direct discharges into navigable waters. Accordingly, the District Court's ruling that the CWA requires that a discharge occur *directly* into United States waters, even if the discharge flows over and through land and groundwater, is a mischaracterization of the CWA's requirements and runs contrary to case law interpreting it.

2. Discharges to Surface Waters through Groundwater that Have Hydrologic Connections to Surface Waters Violate the Clean Water Act

The District Court next incorrectly determined that discharges involving direct hydrologic connections do not violate the CWA. This determination runs afoul of the purpose of the CWA and the majority of court opinions interpreting the CWA.

As stated above, the language of the CWA broadly defines the "discharge of any pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §§ 1311, 1362(12)(A). Based on this broad language, most courts considering the issue of unpermitted discharges to surface waters via hydrologically connected groundwaters have held that these discharges violate the CWA. *See* Conservation Group's Opening Br. 27-28 n.7 (collecting cases); *see also id.* at 30-36 (collecting cases from district courts within this Circuit, opinions from the Tenth and Seventh Circuit, and statements from the Department of Justice and EPA).

Further, in *Flint Riverkeeper, Inc. v. Southern Mills, Inc.*, the defendant maintained a land application system ("LAS") to treat industrial wastewater. No. 5:16-CV-435 (CAR), 2017 WL 2059659, at *1 (M.D. Ga. May 12, 2017). Defendant sought dismissal of plaintiffs' claims, arguing that the "discharge of pollutants into groundwater does not constitute discharge into 'navigable waters' under the CWA." *Id.* at *4. The *Flint* court disagreed and recognized that plaintiffs

did not simply allege that defendant discharged pollutants into groundwater. *Id.* Instead, plaintiffs alleged that defendant discharged "pollutants from its LAS that seep underground and enter tributaries of the Flint River via groundwater with a direct hydrological connection to surface waters." *Id.* (internal quotations omitted). The court held that "[h]ydrologically connected groundwater serves as a conduit between a point source and 'navigable waters.'" *Id.* (citing *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428, 445 (M.D.N.C. 2015)).

The *Flint* court then correctly recognized that, while the Eleventh Circuit had not yet decided whether the CWA prohibits the discharge of pollutants that reach navigable waters through hydrologically connected groundwaters, a "majority of district courts addressing this issue, however, has concluded the CWA prohibits such discharge." *Id.*; *see also id.* at n.44 (collecting cases).

"Moreover, this view is consistent with the EPA's regulatory pronouncements interpreting 'the Clean Water Act to apply to discharges of pollutants from a point source via groundwater that has a direct hydrologic connection to surface water.'" *Id.* at *5 (quoting Amendments to the Water Quality Standards Regulations That Pertain to Standards on Indian Reservations, Final Rule, 56 Fed. Reg. 64876-01, 64892 (Dec. 12, 1991) (to be codified at 40 C.F.R. pt. 131)); (citing Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines for Concentrated Animal Feeding Operations in Response to the

Waterkeeper, 73 Fed. Reg. 70418-01, 70420 (Nov. 20, 2008) (to be codified at 40 C.F.R. pts. 9, 122, and 412) (explaining "nothing in the 2003 rule was to be construed to expand, diminish, or otherwise affect the jurisdiction of the CWA over discharges to surface water via groundwater that has a direct hydrologic connection to surface water").

Accordingly, this Court should adhere to the express purposes of the CWA and the CWA's citizen suit provision, and follow the sound reasoning of other circuit courts of appeal and the majority of district courts that have decided this issue, and reverse the decision of the District Court.

CONCLUSION

If upheld, the District Court's ruling would severely hinder the ability of the Trust and others to remedy future hazardous liquid pipeline failures that violate the CWA, thereby frustrating the express purpose of the CWA's citizen suit provision. The Pipeline Safety Trust respectfully requests that this Court adopt the Conservation Group's arguments and reverse the April 20, 2017 decision of the District Court dismissing the Conservation Group's Complaint.

Respectfully submitted this 19th day of July, 2017.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B and 32(g)(1), the undersigned certifies that this brief has been prepared using fourteen point, proportionally spaced, serif typeface (Times New Roman). Excluding sections that do not court toward the word limit, the brief contains 4,794 words.

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of July, 2017, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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