NOTES

Upstate Forever v. Kinder Morgan Energy Partners, L.P.: The Fourth Circuit Establishes a New Test for "Discharge from a Point Source" Under the Clean Water Act

I. OVERVIEW

Plantation Pipeline Company, a subsidiary of Kinder Morgan Energy Partners, L.P. (collectively, Kinder Morgan), operated an underground refined products pipeline extending over 1100 miles through parts of the eastern United States.[1] In December 2014, citizens in Anderson County, South Carolina, discovered dead plants, a petroleum odor, and pools of gasoline in the vicinity of the pipeline.[2] Upstate Forever and the Savannah Riverkeeper (collectively, Plaintiffs) alleged that 369,000 gallons of gasoline spilled from the pipeline and that gasoline and gasoline toxins seeped and continued to seep into the ground, water, wetlands, and waterways in Anderson County and the Savannah River Watershed.[3] The Plaintiffs alleged the pollutants traveled through the soil and groundwater into two tributaries of the Savannah River—Browns Creek and Cupboard Creek—1000 and 400 feet away from the leak, respectively, and further percolated into Broadway Lake, Lake Secession, Lake Russell, and the Savannah River.[4] The pipeline broke six to eight feet underground, where gasoline spilled into the soil and groundwater; Kinder Morgan repaired the pipeline shortly after the initial spill, but the gasoline in the soil and groundwater continued to leach.[5] The Plaintiffs claimed that Kinder

1. Upstate Forever v. Kinder Morgan Energy Partners, L.P., 887 F.3d 637, 643 (4th Cir. 2018), *cert. granted* (No. 18-268; Sept. 4, 2018).
2. *Id.*
3. *Id.*
4. *Id.* at 643-44.
5. *Id.* at 643.

Morgan recovered 209,000 gallons of the gasoline and contaminants by the end of 2015 but that it did not recover a significant portion of the remaining 160,000 gallons in the adjacent wetlands of the Savannah River after that time.[6]

In December 2016, the plaintiffs filed a lawsuit against Kinder Morgan alleging discharges of gasoline and gasoline pollutants without a permit, in violation of the Clean Water Act (CWA) under 33 U.S.C. § 1311(a).[7] Kinder Morgan moved to dismiss the Plaintiffs' complaint, under Rules 12(b)(1) and 12(b)(6), for lack of subject matter jurisdiction and failure to state a claim for relief.[8] The district court held that the Plaintiffs failed to state a claim because Kinder Morgan repaired the pipeline; thus, it was no longer discharging pollutants "directly" into navigable waters.[9] The district court also held that the Plaintiffs' claim lacked subject matter jurisdiction, stating that the CWA does not include the movement of pollutants through groundwater that is "hydrologically connected" to navigable waters.[10] The United States Court of Appeals for the Fourth Circuit *held* that the discharge of a pollutant reaching navigable waters 1000 feet or less from the point source through groundwater with a direct hydrological connection to the navigable water(s) fell within the scope of the CWA, thereby reversing the district court.[11] In September 2018, the case was granted certiorari by the Supreme Court.

II. BACKGROUND

In 1972, Congress enacted the CWA to prohibit the discharge of certain contaminants, or "effluents," into the "navigable waters" of the United States.[12] The purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[13] Prior to the CWA, federal law provided water quality standards specifying acceptable levels of pollution, but that approach was found to be broadly ineffective because the standards focused on "tolerable effects" instead of

6. *Id.*
7. *Id.* at 644.
8. *Id.* at 645.
9. *Id.*
10. *Id.*
11. *Id.* at 652.
12. *Id.* at 642 (citing S. Appalachian Mountain Stewards v. A & G Coal Corp., 758 F.3d 560, 563 (4th Cir. 2014); Piney Run Pres. Ass'n v. Cty. Comm'rs of Carroll Cty., 268 F.3d 255, 264-65 (4th Cir. 2001).
13. 33 U.S.C. § 1251(a) (2018).

the preventable causes of water pollution.[14] The previous regulatory framework also only applied to industrial polluters, required some dischargers to obtain both federal and state permits, and two federal agencies shared the federal permit authority.[15] Under the CWA, Congress made the focus of the law limiting discharges of pollutants.[16] A central provision of the CWA establishes that "the discharge of any pollutant by any person shall be unlawful."[17]

The CWA authorizes exceptions to the discharge of pollutants with permits issued under the National Pollutant Discharge Elimination System (NPDES), which allow the permittee limited discharges of pollutants.[18] For one to be liable for a violation under the CWA, there are five requirements: (1) a pollutant must be (2) added (3) to navigable waters (4) from (5) a point source.[19] The CWA authorizes both the government and citizens to bring suit against a polluter; citizen suits must meet several notice requirements.[20]

A. Ongoing Violations Under the CWA

Under the CWA, courts only have jurisdiction over a citizen suit if the complaint alleges an ongoing violation in good faith.[21] A plaintiff can prove an ongoing violation by proving a violation is continuing on or after the date the complaint is filed, or by citing evidence where a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations.[22] If a violation of the CWA were "wholly past," a court would not have jurisdiction to hear a citizen suit under the CWA, even if the past discharge violated the statute.[23]

The Fourth Circuit had not defined an ongoing violation under the CWA, but the court defined as much in *Goldfarb v. Mayor & City Council of Baltimore*, where it held the city had committed an ongoing violation under the Resource Conservation and Recovery Act (RCRA); in that case, Baltimore had stored hazardous chemicals that leaked and continued to

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14. *See* EPA v. State Water Res. Control Bd., 426 U.S. 200, 203 (1976).
15. *Id.*
16. *See, e.g.,* Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 151 (4th Cir. 2000).
17. 33 U.S.C. § 1311(a).
18. *Id.* § 1342(a).
19. Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 165 (D.C. Cir. 1982).
20. 33 U.S.C. § 1365(a)-(b).
21. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 64 (1987).
22. Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd., 884 F.2d 170, 171-72 (4th Cir. 1988).
23. *Gwaltney*, 484 U.S. at 64.

migrate into the soil in violation of RCRA permitting standards.[24] The court in that case cited the Second Circuit, which reasoned that "although a defendant's *conduct* that is causing a *violation* may have ceased in the past . . . what is relevant is that the *violation* is continuous or ongoing.[25] The proper inquiry thus centers on whether the defendant's past or present actions cause an ongoing violation of the statute.[26]

B. Defining "Direct" Pollution from a Point Source

The CWA defines a point source as "any discernible, 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."[27] The language of the CWA only requires that a discharge come "from" a "point source."[28] The Supreme Court has held that a point source "need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters.'"[29] In a plurality opinion of the Supreme Court, Justice Scalia observed that "[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.'"[30] Justice Scalia also observed that lower courts have held that discharges into intermittent channels that wash downstream likely violate the CWA, even if pollutants passed through conveyances in between the point source and the navigable waters.[31]

In *Concerned Area Residents for the Environment v. Southview Farm*, the Second Circuit held that liquid manure from tankers that reached navigable waters through intervening fields was a discharge from a point source.[32] The Second Circuit cited *Southview Farm* in *Waterkeeper Alliance, Inc. v. EPA*, where the court held that, if it were to require both the cause of the pollution and any intervening land to qualify as point sources, this would result in pollutants needing to be channelized not once, but twice before the EPA could regulate them.[33] The Ninth

24. 791 F.3d 500, 512 (4th Cir. 2015).
25. *Id.* at 513 (citing S. Rd. Assocs. v. IBM Corp., 216 F.3d 251, 255 (2d Cir. 2000)).
26. *Id.*
27. 33 U.S.C. § 1362(14) (2018).
28. *See id.* § 1362(12)(A).
29. S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 105 (2004).
30. Rapanos v. United States, 574 U.S. 715, 743 (2006) (quoting 33 U.S.C. § 1362(12)(A)).
31. *Id.*
32. 34 F.3d 114, 119 (2d Cir. 1994).
33. 399 F.3d 486, 510-11 (2d Cir. 2005) (citing *Southview Farm*, 34 F.3d at 119).

Circuit recently took a similar position in *Hawai'i Wildlife Fund v. City of Maui*, rejecting the idea that one can only be liable under the CWA for discharges made directly into navigable waters.[34]

III. COURT'S DECISION

In the noted case, the Fourth Circuit held that (1) the Plaintiffs alleged an ongoing violation of the CWA, and (2) a plaintiff must allege a direct hydrological connection between groundwater and navigable waters to state a valid claim under the CWA.[35] The court made the holding fact-specific and held that the Plaintiffs stated a valid, redressable claim when they alleged pollutants were seeping into navigable waters about 1000 feet from the pipeline.[36]

For the ongoing violation issue, the Fourth Circuit relied upon the text of the CWA, in which no language explicitly bars a plaintiff from seeking injunctive relief after the polluter repaired the initial cause of the pollution.[37] The court compared the CWA to the RCRA, which, for a citizen suit, requires only that the plaintiff allege a polluter has violated an effluent limitation.[38] Further, the court relied in part upon the Second Circuit's interpretation of the RCRA, whereby that court held that a defendant's current activity at a site was not a prerequisite for finding a current violation.[39] The Fourth Circuit likewise rejected Kinder Morgan's interpretations of two cases from other circuits, holding that the facts in the instant matter were distinguishable from those in the other cases.[40] For these reasons, the Fourth Circuit held the Plaintiffs alleged an ongoing violation of the CWA, and the district court erred in dismissing the complaint for lack of subject matter jurisdiction.[41]

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34. 886 F.3d 737, 752 (9th Cir. 2018).

35. Upstate Forever v. Kinder Morgan Energy Partners, L.P., 887 F.3d 637, 651 (4th Cir. 2018), *cert. granted* (No. 18-268; Sept. 4, 2018).

36. *Id.* at 651-52.

37. *Id.* at 647.

38. *Id.*

39. *Id.* at 648 (citing S. Rd. Assocs. v. IBM Corp., 216 F.3d 251, 254 (2d Cir. 2000)).

40. *See id.* at 649 (citing Conn. Coastal Fishermen's Ass'n v. Remington Arms Co., 989 F.2d 1305, 1312-13 (2d Cir. 1993); Hamker v. Diamond Shamrock Chem. Co., 756 F.2d 392, 397 (5th Cir. 1985)).

41. *Id.*

The court then focused on an issue of first impression: whether the discharge of a pollutant that moves through groundwater before reaching navigable waters falls under the purview of the CWA.[42] The Fourth Circuit relied on Justice Scalia's plurality opinion in *Rapanos v. United States*, which noted that the CWA does not proscribe the "addition of any pollutant *directly* to navigable waters from any point source, but rather the addition of any pollutant to navigable waters."[43] The court also incorporated Scalia's observation that federal courts consistently held that the discharge of a pollutant that washes downstream likely violates the CWA.[44]

The Fourth Circuit also incorporated a textual analysis of the CWA, reasoning that a discharge need only come from a point source.[45] Relying upon dictionary definitions of the word "from," the court developed a plain-meaning analysis indicating that a starting point does not need to convey the pollutants directly to navigable waters for the purposes of the CWA.[46] The court reasoned that holding otherwise would require that the pollutants travel through other point sources entirely until the pollutant reached navigable water.[47] The court cited *Waterkeeper Alliance* from the Second Circuit, which rejected the same reasoning and held that requiring both the cause of pollution and intervening land to qualify as point sources would impose a requirement that pollutants would need to be channelized twice before the EPA could regulate them, which would be outside of the scope of what Congress contemplated in drafting the CWA.[48]

The court, however, did not take the position that a discharge through groundwater alone would support liability under the CWA, but only where there was a "direct hydrological connection."[49] Further, determining whether a direct hydrological connection exists is a factual inquiry.[50] The court reasoned that, since the Plaintiffs alleged the pollutants leached into navigable waters about 1000 feet from the pipeline, and that the Tenth Circuit held that a discharge passing through a 2.5-mile tunnel between a mine shaft and navigable waters was covered under the CWA, it was

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42. *Id.*

43. *Id.* at 650 (citing Rapanos v. United States, 547 U.S. 715, 743 (2006) (quoting 33 U.S.C. § 1362(12)(A) (2018))).

44. *Id.* (citing *Rapanos*, 547 U.S. at 743 (citing United States v. Velsicol Chem. Corp., 438 F. Supp. 945, 946-947 (W.D. Tenn. 1976))).

45. *Id.* (citing 33 U.S.C. § 1362 (12)(A)).

46. *Id.*

47. *Id.*

48. *Id.* (citing Waterkeeper All. v. EPA, 399 F.3d 486, 510-11 (2d Cir. 2005)).

49. *Id.* at 651.

50. *Id.*

evident the CWA applied to the seepage in the noted case.[51] Lastly, the court noted that the origin of the pollutants was not at issue and the discharge was traceable to the pipeline so as to provide evidence of a discharge from a point source under the CWA.[52] The Fourth Circuit therefore held that a discharge of pollutants reaching navigable waters located 1000 feet or less from the point source through groundwater with a direct hydrological connection fell within the scope of the CWA.[53]

IV. ANALYSIS

The holding in the noted case accords with Second and Ninth Circuit precedent, such that the discharge of a pollutant need not be channeled by a point source until it reaches navigable waters.[54] The holding here was also consistent with that in *Goldfarb*, which concerned the RCRA, given that the Fourth Circuit determined that the CWA requires only an ongoing addition to navigable waters for a possible CWA violation.[55] A possible issue in so aligning the CWA and RCRA could be that one statute covers discharges into water bodies and the other covers contamination of land.[56] With the two statutes covering fundamentally different types of pollution, the Supreme Court could conceivably reject the Fourth Circuit's logic in aligning the two statutes regarding ongoing pollution. In *Goldfarb*, the chemicals covered under the RCRA traveled from the point of storage into the soil, which does not involve groundwater carrying the contaminants, thus, arguably, distinguishing the two cases.[57] The Supreme Court, then, may somehow hold that a pipeline spill, which had been partially cleaned up, does not constitute an ongoing violation of the CWA, or, it may, but for reasons different from those explicated by the court here. If the Court determines that the spill here was outside the purview of the CWA, that would presumably leave a negligence suit or something similar as a potential remedy.

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51. *See id.* at 652 (citing Sierra Club v. El Paso Gold Mines, Inc., 421 F.3d 1133, 1137, 1148-50 (10th Cir. 2005)).

52. *Id.*

53. *Id.*

54. *Id.* at 651.

55. *Id.* at 648 (citing Goldfarb v. Mayor & City Council of Balt., 791 F.3d 500, 513 (4th Cir. 2015)).

56. *See id.* at 647.

57. *See id.* (citing *Goldfarb*, 791 F.3d at 512).

With regard to the issue of what defines the discharge of a pollutant from a point source under the CWA, the Fourth Circuit largely relied on the textual interpretation of the statute as well as cases from the Second, Ninth, and Tenth Circuits because this was an issue of first impression in the Fourth Circuit.[58] The court's reliance on *Sierra Club v. El Paso Gold Mines* may well be a point with which the Supreme Court ultimately takes issue as the Fourth Circuit invoked spatial distance, which is not explicitly a consideration in the CWA, in creating a kind of soft test for "discharge" proximity and evident impact.[59] Given an increasingly conservative Court's stated desire to rein in the CWA's regulatory domain,[60] it could conceivably wish to remand or clarify based on the Fourth Circuit's incorporation of relative distance. The practical impact of such a remand or clarification would be to ensure that the distance of 2.5 miles does not become some kind of de facto reference point, or "bright line," for CWA liability.

The Sixth Circuit recently held—contrary to the court here, as well as those in other circuits—in *Kentucky Waterways Alliance v. Kentucky Utilities Co.* that the CWA did not extend to pollution traveling through groundwater.[61] The court reasoned that the CWA would conflict with the RCRA if the groundwater rule were in place because any coal ash pond with a hydrological connection to navigable water would require an NPDES Permit, which would contravene RCRA coverage because coal ash is considered solid waste.[62] Given that recent case and the Supreme Court's docketing of the instant matter, the issue of indirect discharges via groundwater under the CWA exists in a state of apparent flux.

V. CONCLUSION

In the noted case, the Fourth Circuit took a particularized step in clarifying indirect discharges under the CWA. The court cemented its reasoning by utilizing a RCRA case seemingly apposite to the definition of an ongoing violation; the logic there, as stated, may not be airtight but certainly seems solid. In the noted case, it was apparent that Kinder

58. *See id.* at 651-52.

59. *See id.* at 652 ("This extremely short distance, if proved, provides strong factual support for a conclusion that Kinder Morgan's discharge is covered under the CWA.").

60. Rapanos v. United States, 547 U.S. 715, 722 (2006) ("The enforcement proceedings . . . are a small part of the immense expansion of federal regulation of land use that has occurred under the Clean Water Act—without any change in the governing statute—during the past five Presidential administrations.").

61. 905 F.3d 925, 940 (6th Cir. 2018).

62. *Id.* at 937-38.

Morgan's gasoline was the pollutant discharged into the watershed and a pipeline was obviously a "point source." Thus, given the relative importance in recent years of defining the CWA's domain—an issue that reared its head in *Rapanos* but has continued given the plurality opinion and fairly nebulous concurrence in that case—it seems probable that the Court has selected to docket this case because of its holding regarding an ongoing CWA violation and/or its apparent creation of a distance-defined test, which could be anathema to an increasingly conservative-"textualist" Court.

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