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, ANDERSON DIVISION
CASE NO. 8:16-cv-04003-HMH

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, EDISON ELECTRIC INSTITUTE, NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL LEAGUE OF CITIES, NATIONAL MINING ASSOCIATION, AND UTILITY WATER ACT GROUP AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES' PETITION FOR REHEARING AND PETITION FOR REHEARING *EN BANC*

F. William Brownell
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Ave., N.W.
Washington, DC 20037
(202) 955-1500
bbrownell@HuntonAK.com

Nash E. Long, III
Brent A. Rosser
HUNTON ANDREWS KURTH LLP
Bank of America Plaza
101 South Tryon Street
Charlotte, NC 28280
(704) 378-4700
nlong@HuntonAK.com
brosser@HuntonAK.com

Elbert Lin
HUNTON ANDREWS KURTH LLP
Riverfront Plaza, East Building
951 East Byrd Street
Richmond, VA 23219
(804) 788-7202
elin@HuntonAK.com

Dated: May 3, 2018 *Counsel for Amici Curiae*

[*Additional Counsel Listed on the Following Page*]

Steven P. Lehotsky
Michael B. Schon
U.S. CHAMBER LITIGATION CENTER
1615 H Street N.W.
Washington, DC 20062

Counsel for the Chamber of Commerce of the United States of America

Peter C. Tolsdorf
NATIONAL ASSOCIATION OF MANUFACTURERS
733 10th Street, N.W., Suite 700
Washington, DC 20001

Counsel for National Association of Manufacturers

Kristy A. Niehaus Bulleit
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Avenue, N.W.
Washington, DC 20037
(202) 955-1500
kbulleit@HuntonAK.com

Counsel for Utility Water Act Group

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

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No. 17-1640 Caption: Upstate Forever et al. v. Kinder Morgan Energy Partners, L.P. et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Chamber of Commerce of the United States of America
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
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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/ Elbert Lin Date: May 3, 2018

Counsel for: Chamber of Commerce of the USA

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No. 17-1640 Caption: Upstate Forever et al. v. Kinder Morgan Energy Partners, L.P. et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Edison Electric Institute
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Elbert Lin Date: May 3, 2018

Counsel for: Edison Electric Institute

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No. 17-1640 Caption: Upstate Forever et al. v. Kinder Morgan Energy Partners, L.P. et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

National Association of Clean Water Agencies
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Elbert Lin Date: May 3, 2018

Counsel for: Nat'l Ass'n of Clean Water Agencies

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Pursuant to FRAP 26.1 and Local Rule 26.1,

National Association of Manufacturers
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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Signature: /s/ Elbert Lin Date: May 3, 2018

Counsel for: National Association of Mfrs.

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Pursuant to FRAP 26.1 and Local Rule 26.1,

National League of Cities
(name of party/amicus)

who is amicus, makes the following disclosure:
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Signature: /s/ Elbert Lin Date: May 3, 2018

Counsel for: National League of Cities

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No. 17-1640 Caption: Upstate Forever et al. v. Kinder Morgan Energy Partners, L.P. et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

National Mining Association
(name of party/amicus)

who is amicus, makes the following disclosure:
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1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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Signature: /s/ Elbert Lin Date: May 3, 2018

Counsel for: National Mining Association

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No. 17-1640 Caption: Upstate Forever et al. v. Kinder Morgan Energy Partners, L.P. et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Utility Water Act Group
(name of party/amicus)

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are the Chamber of Commerce of the United States of America, Edison Electric Institute, National Association of Clean Water Agencies, National Association of Manufacturers, National League of Cities, National Mining Association, and Utility Water Act Group. *Amici* represent a cross-section of the economy with members that are subject to the Clean Water Act ("CWA" or "Act") and other federal and state environmental laws and regulations. *Amici* have an interest in the uniform interpretation and application of the CWA's point source and nonpoint source programs, and the CWA's interaction with other environmental laws. *Amici*'s members will bear the regulatory uncertainty and increased costs resulting from the panel's decision.

INTRODUCTION

This Court should grant rehearing or rehearing en banc because the decision conflicts with several Supreme Court decisions and those of other federal appeals courts. Based on an incomplete analysis of the CWA's text, structure, and history, and a failure to recognize the many other federal and state laws that protect the integrity of groundwater, the panel majority vastly expanded the reach of the

[1] This brief was submitted with a motion for leave to file pursuant to Federal Rule of Appellate Procedure 29(b). No counsel for a party authored this brief in whole or in part, and no party or their counsel or any person other than *amici*, their members, or their counsel contributed money that was intended to fund the preparation or submission of this brief.

CWA's National Pollutant Discharge Elimination System ("NPDES") permitting program for point source pollution. That expansion threatens to undermine other CWA programs and environmental laws actually intended to regulate discharges to groundwater and conflicts with key judicial precedent.

First, in refusing to limit the NPDES program to pollution that reaches navigable waters by way of a point source, the decision conflicts with *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001), and *Sierra Club v. Abston Construction Co.*, 620 F.2d 41 (5th Cir. 1980), among other cases.

Second, in contravention of *Utility Air Regulatory Group v. Environmental Protection Agency*, 134 S. Ct. 2427 (2014) ("*UARG*"), and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), the majority expanded the NPDES program to millions of previously unpermitted sources and readjusted the federal-state balance without clear congressional authorization.

Third, contrary to concerns about the CWA expressed in *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016), and *Sackett v. Environmental Protection Agency*, 566 U.S. 120 (2012), the decision injects regulatory uncertainty and higher costs into the NPDES program.

ARGUMENT

I. The Decision Conflicts with the Supreme Court and Other Appellate Courts Over the Meaning of "Discharge of a Pollutant."

A. The majority parted with other courts over whether a point source must be the means by which a pollutant is added to navigable water.

As the dissent observes, the Supreme Court and several federal appellate courts have concluded that the "discharge of a pollutant," which triggers the NPDES program, occurs only where a point source "convey[s], transport[s] or introduce[s] the pollutant to navigable waters." *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 2018 WL 1748154, at *15 (4th Cir. Apr. 12, 2018) ("*Kinder Morgan*") (Floyd, J., dissenting). The Supreme Court said so unanimously in *Miccosukee*. "The Act defines the phrase 'discharge of a pollutant' to mean 'any addition of any pollutant to navigable waters from any point source.'" 541 U.S. at 102 (quoting 33 U.S.C. § 1362(12)). In turn, a "point source" is "'any discernible, confined and discrete conveyance' … 'from which pollutants are or may be discharged.'" *Id.* (quoting 33 U.S.C. § 1362(14)). Emphasizing the word "conveyance," the Court held that the "definition makes plain" that "a point source need not be the original source of the pollutant," but "it need[s] [to] … *convey* the pollutant to 'navigable waters.'" *Id.* at 105 (emphasis added).

Several appeals courts have reached the same conclusion. In *Catskill Mountains*, the Second Circuit understood the CWA's "plain meaning" to require

that a point source be "the proximate source from which the pollutant is directly introduced to the destination water body." 273 F.3d at 493, 494; *see also Simsbury-Avon Pres. Soc'y, LLC v. Metacon Gun Club, Inc.*, 575 F.3d 199, 224 (2d Cir. 2009) (CWA "requires that pollutants reach navigable waters by a 'discernible, confined and discrete conveyance'"). Likewise, the Fifth Circuit has held that point sources must "be the means by which pollutants are ultimately deposited into a navigable body of water." *Abston Const.*, 620 F.2d at 45.[2]

The panel decision squarely conflicts with these cases. It rejects that "the Act require[s] a discharge directly from a point source," concluding that a point source must only be "the starting point or cause of a discharge under the CWA." *Kinder Morgan*, 2018 WL 1748154, at *7.

The majority incorrectly reasons (*id.* at *7 n.11) that these cases have been overtaken by Justice Scalia's plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006). *First*, the cited discussion is *dictum* that "do[es] not decide th[e] issue." *Id.* at 743 (plurality op.). *Second*, the majority, in any event, mischaracterizes the opinion. Justice Scalia said NPDES permitting may apply if a point source discharges pollutants that reach navigable waters *through*

[2] The Fifth and Seventh Circuits also have rejected the argument here that pollutants conveyed into navigable waters by groundwater, which is *not* a point source, constitute a discharge to navigable waters. *See Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir. 1994); *Rice v. Harken Expl. Co.*, 250 F.3d 264 (5th Cir. 2001).

"intermittent channels," id. (emphasis added)—a phrase the panel does not address. And those channels might "themselves constitute 'point sources.'" *Id.* That is consistent with the cases above, which hold that a point source need not be "where the pollutant[s] w[ere] created," but that point sources must "transport[] the[] [pollutants] from their original source to the destination water body." *Catskill Mountains*, 273 F.3d at 493.[3]

B. The panel overlooked critical indications of congressional intent in the CWA's text, structure, and history.

The conflict results from a failure to address important aspects of the CWA's text, structure, and history.

First, unlike the Supreme Court in *Miccosukee*, the panel failed to address *all* the relevant statutory text. Though the majority discussed the definition of "discharge of a pollutant," *Kinder Morgan*, 2018 WL 1748154, at *7-8, it did not parse the definition of "point source," which the Supreme Court found critical in *Miccosukee*. Read together, the two definitions state that a "discharge of a pollutant" occurs only when a pollutant is added to navigable waters from "a discernible, confined and discrete *conveyance* … from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (emphasis added). The use of the word

[3] Though it claims otherwise (*Kinder Morgan*, 2018 WL 1748154, at *8 n.12), the panel decision also conflicts with *Hawai'i Wildlife Fund v. County of Maui*, in which the Ninth Circuit *rejected* the concept of a direct hydrological connection because that concept "reads two words into the CWA ('direct' and 'hydrological') that are not there." 886 F.3d 737, 749 n.3 (9th Cir. 2018).

"conveyance" to define a point source— as a "*means of* carrying or *transporting*" pollutants and not merely a point of origin[4]—demonstrates that a point source must be the way by which pollutants reach navigable waters.

Second, the panel overlooked other CWA NPDES provisions, which further evidence that the program applies only where pollutants reach navigable waters by means of a point source. For example, NPDES program discharges must meet "effluent limitations," which are defined as restrictions on quantities, rates, or concentrations of pollutants "discharged from point sources *into* navigable waters." 33 U.S.C. § 1362(11) (emphasis added). The word "into" contemplates point sources introducing pollutants to navigable waters. Moreover, these limitations require identifiable discharge points—point sources—to measure pollutants being added before they disperse.

Third, unlike the dissent, the majority largely disregarded that "Congress consciously distinguished between point source and nonpoint source discharges." *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976). As "an organizational paradigm of the Act," *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 550 F.3d 778, 780 (9th Cir. 2008), Congress drew "a distinct line between point and nonpoint pollution sources," *Or. Nat. Res. Council v. U.S. Forest Serv.*, 834 F.2d 842, 849 (9th Cir. 1987).

[4] *Conveyance*, Webster's New International Dictionary of the English Language Unabridged (3d ed. 1993) (emphases added).

That framework further confirms the majority's error. Requiring that pollutants reach navigable waters by way of a point source draws a "distinct line" between point and nonpoint source pollution. In contrast, the panel's view that a point source need only be a pollutant's "'starting point'" draws at best a blurry line. *Kinder Morgan*, 2018 WL 1748154, at *7. Even with its ad hoc requirement of a direct hydrological connection, the panel's approach could require NPDES permitting for many traditional nonpoint sources of pollution both below and above ground, such as sheet flow runoff that carries oil leaked from cars onto pavement. *See, e.g.*, U.S. Envtl. Prot. Agency ["EPA"], "What is Nonpoint Source?"[5]

Finally, the panel completely failed to acknowledge the CWA's contemporaneous legislative record, which shows that "Congress was aware that there was a connection between ground and surface waters but nonetheless decided to leave groundwater unregulated by the CWA." *Rice*, 250 F.3d at 271.

C. The panel did not recognize other applicable regulatory programs.

The panel also failed to recognize that pollutants released to groundwater are controlled under other state and federal regulatory programs with which the panel's approach interferes.

[5] This source is available at https://www.epa.gov/nps/what-nonpoint-source (last visited May 1, 2018).

As states have explained to this and other courts, they protect groundwater independent of the NPDES program.[6] State laws consistently prohibit the discharge of pollutants into any state waters, surface or ground, and provide for separate enforcement authority. *See, e.g.*, W. Va. Code § 22-11-8(b). Moreover, consistent with the CWA's policy of preserving the states' "primary responsibilities and rights" over water pollution, 33 U.S.C. § 1251(b), the Act provides federal support to states to regulate nonpoint source pollution, including groundwater, *id.* § 1329(b)(2)(A).

The panel's approach also interferes with other federal programs that specifically address impacts to groundwater. The Comprehensive Environmental Response, Compensation, and Liability Act concerns remediation of the release of hazardous substances into the "environment," a term that expressly includes groundwater. 42 U.S.C. § 9601(8). The Safe Drinking Water Act ("SDWA") controls underground injection wells and protects groundwater drinking water supplies. 42 U.S.C. §§ 300h-300h-8. And under the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq*., EPA has promulgated a rule in part to

[6] *See, e.g.*, Brief of *Amici Curiae* the State of West Virginia et al., *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, No. 17-1640 (4th Cir. Sept. 8, 2017) (Doc. 55-1) ("West Virginia *Amicus* Brief"); Brief of the State of Alabama et al. as *Amici Curiae*, *Tenn. Clean Water Network v. Tenn. Valley Auth.*, No. 17-6155 (6th Cir. Feb. 6, 2018) (Doc. 38) ("Alabama *Amicus* Brief"); Brief of *Amici Curiae* States of Arizona et al., *Hawai'i Wildlife Fund v. Cty. of Maui*, No. 15-17447 (9th Cir. Mar. 12, 2018) (Doc. 75) ("Arizona *Amicus* Brief").

control and remediate groundwater contamination from coal ash impoundments. 80 Fed. Reg. 21,302 (Apr. 17, 2015). How that rule intersects with the theory of NPDES jurisdiction adopted here is squarely at issue in *Sierra Club v. Virginia Electric & Power Co., d/b/a Dominion Energy Virginia*, No. 17-1895(L) (4th Cir. filed Aug. 2, 2017), a further reason for rehearing here.

II. The Decision Conflicts with Supreme Court Cases Requiring a Clear Statement of Congressional Intent.

The Supreme Court has held that a federal statute cannot be interpreted to radically expand its reach absent a clear indication from Congress. The Court "expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *UARG*, 134 S. Ct. at 2444 (quotation marks omitted). That includes "[t]he power to require permits for … thousands, and the operation of millions, of small sources nationwide." *Id*. The Court also requires "a clear statement from Congress" before effectuating "a significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174.

The decision runs afoul of both *UARG* and *SWANCC*. As in *UARG*, the majority extends a permitting program to millions of previously unpermitted sources without clear congressional authorization. For example, more than 22.2

million homes have septic systems,[7] which can discharge pollutants into groundwater possibly connected to navigable waters but which have not previously required NPDES permits. And across the country, there are almost half a million Class V non-hazardous wells under the SDWA underground injection control program —including wastewater treatment wells the Ninth Circuit recently subjected to its own theory of expanded NPDES permitting in *Hawai'i Wildlife Fund*. But contrary to the Court's mandate in *UARG*, the majority points to nothing resembling "clear congressional authorization" for such an expansion of the NPDES program.

Similarly, the decision dramatically "readjust[s] the federal-state balance" without the clear statement required by *SWANCC*. 531 U.S. at 174. It "require[s] a dramatic expansion of … NPDES programs" while decreasing the application of state nonpoint source programs. West Virginia *Amicus* Br. 11; *see also* Alabama *Amicus* Br. 10; Arizona *Amicus* Br. 9. But rather than clearly authorizing that shift in the federal-state framework, the CWA instead leaves groundwater pollution to state regulation, as discussed above.

[7] *See* U.S. Department of Housing and Urban Development and U.S. Census Bureau, American Housing Survey for the United States: 2011, Current Housing Reports, H150/11, at 14, Tbl. C-04-AO (Sept. 2013), https://www.census.gov/content/dam/Census/programs-surveys/ahs/data/2011/h150-11.pdf.

III. The Decision Conflicts with Supreme Court Opinions Expressing Concern with Regulatory Uncertainty and High Costs Under the CWA.

Recent Supreme Court opinions express concern about both high costs and regulatory uncertainty under the CWA. In *Hawkes*, the Court stressed that the NPDES process "can be arduous, expensive, and long." 136 S. Ct. at 1815. Justice Kennedy, joined by Justices Thomas and Alito, was more direct in his concurrence: "the reach and systemic consequences of the [CWA] remain a cause for concern" because "the consequences to landowners even for inadvertent violations can be crushing." *Id.* at 1816 (Kennedy, J., concurring). A few years earlier, Justice Alito wrote separately in *Sackett* to criticize EPA's failure to interpret the CWA in a way that provides "clarity and predictability." 566 U.S. at 132-33 (Alito, J., concurring).

The majority runs headlong into these concerns. Its "fact-specific" requirement of a direct hydrological connection, *Kinder Morgan*, 2018 WL 1748154, at *8, is the antithesis of the "clarity and predictability" the NPDES program needs. For example, the decision does not explain how "direct" a connection must be or what constitutes a sufficiently "measurable quantit[y]" of pollutants. *Id.* at *9. The only certainty is increased regulatory confusion and costs. The public already spends more than 26 million labor hours and $1 billion

annually on NPDES permits.[8] There now will be more permits, testing, and litigation as regulated entities are "left to feel their way on a case-by-case basis." *Sackett*, 566 U.S. at 124 (quotation marks omitted).

CONCLUSION

The petition should be granted.

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Respectfully submitted,

/s/ Elbert Lin

F. William Brownell
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Ave., N.W.
Washington, DC 20037
(202) 955-1500
bbrownell@HuntonAK.com

Nash E. Long, III
Brent A. Rosser
HUNTON ANDREWS KURTH LLP
Bank of America Plaza
Suite 3500
101 South Tryon Street
Charlotte, NC 28280
(704) 378-4700
nlong@HuntonAK.com
brosser@HuntonAK.com

Elbert Lin
HUNTON ANDREWS KURTH LLP
Riverfront Plaza
East Building
951 East Byrd Street
Richmond, VA 23219
(804) 788-7202
elin@HuntonAK.com

Counsel for Amici Curiae Chamber of Commerce of the United States of America, Edison Electric Institute, National Association of Clean Water Agencies, National Association of Manufacturers, National League of Cities, National Mining Association, and Utility Water Act Group

[8] *See* EPA, ICR Supporting Statement, Information Collection Request for National Pollutant Discharge Elimination System (NPDES) Program (Renewal), OMB Control No. 2040-0004, EPA ICR No. 0229.22, at 23, Tbl. 12.1, App. A (Sept. 2017), https://www.regulations.gov/document?D=EPA-HQ-OW-2008-0719-0110.

Steven P. Lehotsky
Michael B. Schon
U.S. CHAMBER LITIGATION CENTER
1615 H Street N.W.
Washington, DC 20062

Counsel for the Chamber of Commerce of the United States of America

Peter C. Tolsdorf
NATIONAL ASSOCIATION OF MANUFACTURERS
733 10th Street, N.W., Suite 700
Washington, DC 20001

Counsel for National Association of Manufacturers

Kristy A. Niehaus Bulleit
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Avenue, N.W.
Washington, DC 20037
(202) 955-1500
kbulleit@HuntonAK.com

Counsel for Utility Water Act Group

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Effective 12/01/2016

No. 17-1640 **Caption:** Upstate Forever v. Kinder Morgan Energy Partners

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of May 2018, the foregoing document was served on all parties or their counsel of record through the CM/ECF system at the addresses indicated below:

Clayton Monroe Custer – ccuster@wcsr.com
Richard Edwin Morton – rmorton@wcsr.com
James P. Cooney, III – jcooney@wcsr.com
Todd Winfield Billmire – tbillmire@wcsr.com
Jackson Rehm Price – japrice@wcsr.com
Frank S. Holleman, III – fholleman@selcnc.org
Christopher K. DeScherer – cdescherer@selcsc.org
Nicholas S. Torrey – ntorrey@selcnc.org

/s/ Elbert Lin
Elbert Lin

APPENDIX: DESCRIPTION OF *AMICI CURIAE*

Amici represent cities and public clean water utilities, and a broad cross-section of the nation's business, energy, mining, and manufacturing sectors, with members that are often subject to the requirements of the CWA. 33 U.S.C. §§ 1251 *et seq*.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The Edison Electric Institute ("EEI") is the association that represents all U.S. investor-owned electric companies. EEI members provide electricity for 220 million Americans and operate in all 50 states and the District of Columbia. As a whole, the electric power industry supports more than 7 million jobs in communities across the United States. EEI members take their environmental stewardship seriously and advocate for clear, reasonable regulatory programs.

The National Association of Clean Water Agencies ("NACWA") is a non-profit trade association representing the interests of publicly owned wastewater and stormwater utilities across the United States. NACWA's members include more than 300 municipal clean water agencies that own, operate, and manage publicly owned treatment works, wastewater sewer systems, stormwater sewer systems, water reclamation districts, and all aspects of wastewater collection, treatment, and discharge, including various forms of pipelines.

The National Association of Manufacturers (the "NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

National League of Cities ("NLC") is the country's largest and oldest organization serving municipal governments and represents more than 19,000 U.S. cities and towns. Many of NLC's members provide water, stormwater, wastewater

and other public services. NLC advocates on behalf of cities on critical issues that affect municipalities and warrant action.

The National Mining Association ("NMA") is a national trade association whose members produce most of America's metals, coal, and industrial and agricultural minerals. NMA's membership also includes manufacturers of mining and mineral processing machinery, equipment and supplies, transporters, financial and engineering firms, and other businesses involved in the nation's mining industries.

The Utility Water Act Group is a voluntary, non-profit, unincorporated group of 153 individual energy companies and three national trade associations of energy companies: the Edison Electric Institute, the National Rural Electric Cooperative Association, and the American Public Power Association. The individual energy companies operate power plants and other facilities that generate, transmit, and distribute electricity to residential, commercial, industrial, and institutional customers.