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October 24, 2016

Via Certified Mail – Return Receipt Requested

The Honorable Regina McCarthy
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington, DC 20460

The Honorable Catherine E. Heigel
Director
South Carolina Department of Health and
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2600 Bull Street
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**Notice of Intent to Sue
Clean Water Act Section 505 - 33 U.S.C. § 1365**

RE: 60-Day Notice of Violations by Kinder Morgan Energy Partners, L.P. and Plantation Pipe Line Company, Inc. at the Plantation Pipeline in Anderson County, South Carolina

To Whom It May Concern:

Pursuant to Section 505(b) of the Clean Water Act (33 U.S.C. §1365(b)), the Savannah Riverkeeper (“Riverkeeper”) and Upstate Forever (“UF”) (together, the “Conservation Groups”), through their undersigned counsel, provide notice of the violations of the Clean Water Act, as set forth below. 33 U.S.C. § 1365(f). After the expiration of sixty (60) days, the Conservation Groups intend to bring suit for these violations pursuant to the citizen suit provision of the Clean Water Act, Section 505(a), 33 U.S.C. § 1365(a).

Background & Location of Violations

Kinder Morgan Energy Partners, L.P. (“Kinder Morgan”), which is headquartered in Houston, Texas, owns an interest in and/or operates 84,000 miles of pipelines in North America, making it the largest energy infrastructure company in the United States.¹ Plantation Pipe Line Company, Inc. (“Plantation”), which is a subsidiary of Kinder Morgan, owns the Plantation Pipeline.² The Plantation Pipeline carries over 29 million gallons of petroleum products each day, and it cuts through Anderson County, South Carolina on a 3,100 mile path from Louisiana to the Washington, D.C. area.³

In 2014, it was discovered that an aged patch over a dent in the Plantation Pipeline near Lewis Drive in Belton, S.C., failed, causing one of the largest pipeline spills in South Carolina history. The precise date of the failure is unknown, and the pipeline may have leaked for an extended period of time before citizens discovered dead vegetation, a petroleum odor, and pooling around the pipeline in early December 2014. Plantation shut down the 26-inch pipeline in December once citizens’ reports were confirmed.⁴

Documents produced by the South Carolina Department of Health and Environmental Control (“DHEC”) indicate that an estimated 369,600 gallons of gasoline and petroleum product have been released at the site.⁵ In December 2014, the subsurface petroleum product was reportedly over fourteen feet thick in some areas.⁶ At the outset of the incident, DHEC’s regional and emergency response teams and Plantation undertook some surface water and groundwater monitoring around the site and removed some of the petroleum. About 7,400 gallons of petroleum product were removed in the first day of remediation.⁷ Although a reported 209,000 gallons of product were removed from the site by the end of 2015, “[n]o measurable volume of material has been recovered since early 2016.”⁸ As such, at least 160,500 gallons of petroleum product remain in the environment and unaccounted for.⁹ Given that the exact date and duration of the pipeline failure are uncertain, this figure is approximate, and possibly a significant underestimate. The gasoline that remains in the area of the spill is breaking down into the hazardous compounds that comprise gasoline – including benzene, toluene, ethylbenzene, xylenes, methyl tert-butyl ether (“MTBE”), naphthalene, and other contaminants – and contaminating groundwater, wetlands, and surface waters in the Savannah River watershed.

¹ Kinder Morgan, <http://www.kindermorgan.com/> (last visited Oct. 21, 2016).

² In addition to Kinder Morgan Energy Partners, L.P. and the Plantation Pipe Line Company, Inc., there are a number of other related entities that may share responsibility for the Plantation Pipeline. These additional companies include Kinder Morgan Energy Management, LLC; Kinder Morgan, Inc.; and Kinder Morgan G.P., Inc. These companies will be collectively referred to as “Kinder Morgan” for purposes of this notice letter.

³ Kinder Morgan, http://www.kindermorgan.com/pages/business/products_pipelines/plantation.aspx (last visited Oct. 21, 2016).

⁴ Initial Incident Brief (Dec. 9, 2014).

⁵ ch2m, Comprehensive Site Assessment Report: Lewis Drive Release Site ES-1 (July 2016).

⁶ Weekly Report January 27-February 2, 2015, Table 2 Groundwater Level Gauging Data (Feb. 6, 2015).

⁷ *Id.* at 1-2.

⁸ ch2m, Monthly Report 1, 3 (July 2016).

⁹ This figure may be a significant underestimate given that the total amount of oil that leaked out of the pipe is an estimate. Plantation and Kinder Morgan may not have discovered the leak until long after it began.

There are two creeks and two wetlands near the spill site. The creeks in the affected area are depicted in Attachment A. Browns Creek – a tributary to Broadway Creek and headwater of the Savannah River – is located less than a mile to the northeast from the release point. One of the tributaries of Browns Creek, with associated wetlands and a Fish Pond, extends south toward the spill site; it flows within 1,000 feet of the release point.¹⁰ Cupboard Creek and a second, smaller wetland lie 500 feet south of the release point.¹¹ These water bodies are all located in the direction of groundwater flow from the spill site. The site is located near a surface water and groundwater divide and thus drains in two different directions.¹²

Water sampling information obtained from DHEC reveals that hazardous petroleum compounds are in the groundwater near the site and have already reached a tributary of Browns Creek. Since the spill, Plantation has been testing samples against “screening values” that reference various standards designed to protect the environment and human health (hereinafter “standards”).¹³ When petroleum contaminant concentrations exceed these standards, they can increase the risk of cancer and / or cause liver, kidney, and nervous system damage.¹⁴ The recent sampling results reported to DHEC by Plantation in June 2016 show benzene levels over 2,000 times the relevant standard in one groundwater monitoring well.¹⁵ Groundwater samples from various locations near the spill site also exceed benzene, ethylbenzene, toluene, and naphthalene standards.¹⁶

The petroleum products and the groundwater contamination plume have moved toward both streams and wetlands since the spill was first discovered, and they continue to move to the streams and wetlands. Petroleum was initially detected in a tributary to Browns Creek in January 2015, a month after the spill, by a sheen on the water.¹⁷ In November 2015, benzene levels at four surface water locations spiked; by February 2016, Plantation detected benzene at five locations in the affected water body, and reported that surface water samples exceeded the standard for benzene at three of those locations.¹⁸ Toluene, ethylbenzene, and xylenes were also detected in the surface water in several locations between November 2015 and February 2016.¹⁹ Benzene levels remained above the standard through May 2016 at two of these locations South

¹⁰ ch2m, Comprehensive Site Assessment Report: Lewis Drive Release Site 3-2 (July 2016).

¹¹ ch2m, Site Assessment Report: Lewis Drive Release Site 2-3 (Sept. 2015).

¹² ch2m, Comprehensive Site Assessment Report: Lewis Drive Release Site ES-1 (July 2016); ch2m, Site Assessment Report: Lewis Drive Release Site Table 8 (Sept. 2015).

¹³ See, e.g., ch2m, Comprehensive Site Assessment Report: Lewis Drive Release Site Tables 8, 11, 12 (July 2016). ch2m references Risk Based Screening Levels for groundwater and soil, South Carolina Underground Storage Tank Management Division, Quality Assurance Program Plan For the Underground Storage Tank Management Division, Revision 3, C145-47 (2015), <http://www.scdhec.gov/Environment/docs/QAPPRevision3.0.pdf>, as well as EPA Regional Screening Levels and South Carolina “water and organism consumption” standards for surface water, U.S. Env’tl. Prot. Agency, Regional Screening Levels: Tapwater (June 2015); S.C. Dept. of Health & Env’tl. Control, R.61-68, Water Classification & Standards 41-58 (2014), <http://www.scdhec.gov/Agency/docs/water-regs/R.61-68.pdf>.

¹⁴ U.S. Env’tl. Prot. Agency, Table of Regulated Drinking Water Contaminants (last updated Oct. 4, 2016), <https://www.epa.gov/ground-water-and-drinking-water/table-regulated-drinking-water-contaminants>.

¹⁵ The highest benzene concentration in the wells tested was 10,600 µg/L, compared to a standard of 5 µg/L. ch2m, Comprehensive Site Assessment Report: Lewis Drive Release Site, Table 11 (July 2016).

¹⁶ *Id.*

¹⁷ ch2m, Comprehensive Site Assessment Report: Lewis Drive Release Site 2-1 (July 2016).

¹⁸ ch2m, Monthly Report 1, 2, Table 2 (Apr. 21, 2016).

¹⁹ See, *id.* Table 2.

of Lewis Drive in the portion of the tributary closest to the spill, reaching as high as 23.4 µg/L – over ten times the standard.²⁰

According to Plantation’s July 2016 monthly report, one surface water location tested above the relevant benzene standard in June. However, Plantation only samples the tributary once per month, and, as of the last report received from DHEC (July 2016), no sampling has taken place along the bank where groundwater flows into surface water.²¹ Instead, Plantation has sampled on the side of the tributary opposite from where the spill occurred and where another tributary joins. Plantation has sampled at sites where it is least likely to find contamination – as far away as possible from where the contamination enters the tributary and at a point where it is most diluted from the flow of the separate tributary. Therefore the sampling that has occurred so far cannot be expected to provide an accurate and comprehensive picture of water quality. In fact, DHEC demanded in March 2016 that Plantation sample at least sixteen additional locations along Browns Creek and its major tributary, including four “*on the side of the creek*”²² where the release occurred” to provide a more comprehensive picture of water quality.²³ To our knowledge, Plantation has not yet fully complied with this directive.²⁴

Further, because of the unusually dry conditions in the summer of 2016, testing during that period may not indicate the contamination levels that will be in the groundwater and surface water once rainfall amounts return to normal.

Over a year and a half after the spill, the petroleum from Plantation’s spill is visible on the surface of the water in the tributary and surrounding wetlands. The area reeks with heavy smells of petroleum and gasoline. During a site visit conducted by the Conservation Groups on August 2, 2016, a heavy petroleum odor permeated the west bank of the Browns Creek tributary south of Lewis Drive – a portion of the tributary that has not yet been sampled by Plantation.

Plantation has used basic oil absorbent booms in the tributary, supposedly to address the surface water contamination. However, the booms have not been maintained and are not being regularly replaced. Conservation Groups observed on their August visit that plants are actually growing out of some of the neglected booms. At least one of the booms has become dislodged and has been left misplaced pointing in the direction of the flow of the tributary, so that pollutants can flow out of it. Some have been ignored for so long that they have gathered old

²⁰ ch2m, Monthly Report Table 2 (June 2016). The benzene standard ch2m measures against is 2.2 µg/L.

²¹ The July report indicates that two additional surface water sampling sites (SW12 and SW13) have been planned or installed along the tributary, and that at least one of these sites is along the bank closest to the spill. ch2m, Monthly Report Figure 1 (July 2016). However, water from these two sites was not analyzed for contamination in the July report. *Id.* at Table 2.

²² In its reports, Plantation refers to this water body as “Browns Creek,” apparently leading DHEC to do the same. *See, e.g.*, ch2m, Comprehensive Site Assessment Report: Lewis Drive Release Site Figure 2 (July 2016). However, according to the U.S. Geological Survey topographic map and the U.S. Geological Survey’s National Hydrography Dataset, the water body is actually a tributary to Browns Creek.

²³ Letter to Jerry Aycock re. Assessment & Corrective Action Plan Directive (Mar. 21, 2016).

²⁴ *See* ch2m, Monthly Report 1 (Apr. 21, 2016) (assigning three new sampling locations downstream in a fishing pond, but none on the western bank of the creek); ch2m, Monthly Report 2 (July 2016) (categorizing the installation of six additional shallow monitoring wells on the southern bank of Browns Creek as a “future activit[y]” and displaying two additional surface water wells in Figure 1).

litter. Many of the booms in the tributary are darkly colored, indicating that they are saturated and therefore have not been contributing to cleanup activities.

Benzene, toluene, ethylbenzene, xylenes, and MTBE were detected in water and sediment samples that the Conservation Groups collected on August 2, 2016 along the southern and northern portions of the Browns Creek tributary. The Groups found higher concentrations of benzene, ethylbenzene, xylenes, and MTBE in samples taken from the tributary south of Lewis Drive than Plantation is reporting. In addition, toluene and MTBE were detected in surface water samples collected along the west bank north of the Drive – where Plantation has not yet monitored.²⁵

The Plantation Pipeline rupture is just one in a long list of accidents that have occurred at Kinder Morgan pipelines across North America in the last two decades. A survey of these accidents reveals that many of them may have stemmed from similar maintenance and inspection failures. In July 2003, a Kinder Morgan pipeline in Tucson, Arizona ruptured due to stress corrosion cracking,²⁶ showering 12,000 gallons of gasoline onto several houses that were under construction.²⁷ The resulting pipeline closure contributed to gas shortages and price increases across the state.²⁸ In April 2004, over 123,000 gallons of diesel spilled directly into Suisun Marsh – the largest saltwater wetland in the western US – when external corrosion led to a rupture on the North Line pipeline.²⁹ Kinder Morgan eventually settled with state and federal agencies for \$5.3 million over violations associated with the Suisun spill and two additional 2005 spills into sensitive California water bodies.³⁰ The company pledged to improve maintenance and pipe inspection practices to prevent future spills.³¹ Pipeline corrosion also caused an explosion at a Kinder Morgan subsidiary-owned facility near Tatum, Texas in May 2005, blowing 160 feet of pipe onto a neighboring property, releasing 280 million cubic feet of natural gas, and requiring evacuation of everyone within a mile of the facility.³² More recently, in April 2015, a structural failure on the Amarillo No. 4 pipeline in North Texas released 750,000 million

²⁵ In one sample, toluene concentrations were 8,660 µg/L – over eight times the relevant standard of 1,000 µg/L. See ch2m, Comprehensive Site Assessment Report: Lewis Drive Release Site, Table 11 (July 2016).

²⁶ House Majority Research Staff, *House Gasoline Shortage Working Group*, 2 (2004), <http://www.arizonaenergy.org/images/ArizonaFuelSupplyReport031604.pdf>.

²⁷ *Id.*; U.S. Dep't of Transp., Office of Pipeline Safety, CPF No. 4-2003-5010H, Corrective Action Order (Aug. 6, 2003), <http://primis.phmsa.dot.gov/comm/reports/enforce/documents/420035010H/420035010H.pdf>.

²⁸ House Majority Research Staff, *House Gasoline Shortage Working Group*, 1-8 (2004), <http://www.arizonaenergy.org/images/ArizonaFuelSupplyReport031604.pdf>.

²⁹ U.S. Env'tl. Prot. Agency, *Kinder Morgan, SFPP agree to pay nearly \$5.3 million to resolve federal and state environmental violations: Settlement addresses Suisun, Alameda, Donner Lake spills* (May 21, 2007), <https://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/4bbf4038800cedd6852572e200711592>; Consent Decree, *United States v. Kinder Morgan Energy Partners, L.P.* (No. 2:07 at 00443, E.D. Cal., May 21, 2007), available at http://www.cerc.usgs.gov/nrdar/NRDA_Restoration_Table_files/Settlement_Docs/CA_Kinder_Morgan_Suisun_Marsh_spill_CD_05-21-2007.pdf.

³⁰ U.S. Env'tl. Prot. Agency, *Kinder Morgan, SFPP agree to pay nearly \$5.3 million to resolve federal and state environmental violations: Settlement addresses Suisun, Alameda, Donner Lake spills* (May 21, 2007), <https://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/4bbf4038800cedd6852572e200711592>.

³¹ *Id.*

³² U.S. Dep't of Transp., Office of Pipeline Safety, CPF No. 4-2005-1011H, Corrective Action Order (May 26, 2005), http://primis.phmsa.dot.gov/comm/reports/enforce/documents/420051011H/cpf_420051011H.pdf?nocache=8618.

cubic feet of natural gas and resulted in an explosion.³³ The pipeline was originally constructed in 1968, and several other pipelines in the area that Kinder Morgan has a partial interest in have a “history” of stress corrosion cracking.³⁴

Kinder Morgan’s pipelines have also been plagued by accidents that might have been prevented or curbed with better oversight or leak detection systems. In July 2005, buckling and cracking from stress on the Trans Mountain Pipeline in Abbotsford, Canada resulted in the release of over 55,400 gallons of crude oil, smothering 5,755 m² of wetlands with oil, and requiring local residents to evacuate.³⁵ Kinder Morgan’s subsidiary, Terasen Pipelines, had failed to include the damaged portion of pipeline in its leak detection system, allowing a full week to pass before the leak was located.³⁶ Two accidents in 2004 and 2007 resulted from miscommunications between Kinder Morgan employees and contractors. The November 2004 accident near Walnut Creek, CA killed five workers and injured four others after a welding flame ignited gasoline escaping from a punctured pipeline.³⁷ The July 2007 excavation accident in British Columbia sprayed a “geyser” of crude oil over the surrounding residential neighborhood.³⁸ 250 people were displaced, eleven homes were damaged, and over 59,000 gallons were released – with 20,000 gallons seeping into the nearby Burnaby Inlet and affecting 10.5 miles of shoreline.³⁹ In 2011, the Pipeline and Hazardous Materials Safety Administration cited Kinder Morgan for safety violations across Montana, including: failure to update maps showing pipeline locations, failure to test pipeline safety devices, failure to determine whether firefighting equipment was adequate, failure to inspect pipelines as required, and failure to adequately monitor pipe corrosion levels.⁴⁰ Later that year, the U.S. Department of Transportation cited Kinder Morgan for safety violations at a New Jersey facility, including the company’s failure to “have and use [] measures to detect abnormal operating conditions.”⁴¹ Other incidents include a 2011 fire at a New Jersey facility which led to a fine because Kinder Morgan did not have a written policy in place outlining how to safely repair certain valves,⁴² and a 2012 leak in California that released over 585,000 thousand cubic feet of natural gas due to a

³³ U.S. Dep’t of Transp., Office of Pipeline Safety, CPF No. 4-2015-1006H, Corrective Action Order (Apr. 17, 2005), http://primis.phmsa.dot.gov/comm/reports/enforce/documents/420151006H/420151006H_Corrective%20Action%20Order_04172015_text.pdf.

³⁴ *Id.*

³⁵ Transp. Safety Bd. of Canada, P05H0044, Pipeline Investigation Report 2, 4, 6 (Jul. 15, 2005), <http://www.tsb.gc.ca/eng/rapports-reports/pipeline/2005/p05h0044/p05h0044.pdf>.

³⁶ *Id.* at 3, 15.

³⁷ Off. of the State Fire Marshall, Pipeline Failure Investigation Report 1, 3 (Mar. 4, 2005) <http://osfm.fire.ca.gov/pipeline/pdf/WCFinalReport/KMWCInvRep.pdf>.

³⁸ *Cleanup Continues on B.C. Oil Spill*, CBC News (July 24, 2007, 2:08 PM), <http://www.cbc.ca/news/canada/british-columbia/cleanup-continues-on-b-c-oil-spill-1.676094>.

³⁹ Mike Raptis, *Kinder Morgan Ordered to Pay \$150,000 in Burnaby Oil Spill*, The Province (Nov. 10, 2011, 2:00 AM), <http://www.burnabynow.com/news/kinder-morgan-ordered-to-pay-150-000-in-burnaby-oil-spill-1.410790>.

⁴⁰ Pipeline & Hazardous Materials Safety Admin., CPF 5-2011-5005, Notice of Probable Violation and Proposed Compliance Order (Feb. 28, 2011), http://primis.phmsa.dot.gov/comm/reports/enforce/documents/520115005/520115005_NOPV%20PCO_02282011_text.pdf.

⁴¹ U.S. Dep’t of Transp., U.S. Department of Transportation Proposes Fine for New Jersey Pipeline Accident (May 11, 2011), <http://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Press%20Releases/phmsa0911.pdf>.

⁴² U.S. Dep’t of Transp., Office of Pipeline Safety, CPF No. 1-2013-5004, Final Order (May 5, 2014), https://primis.phmsa.dot.gov/comm/reports/enforce/documents/120135004/120135004_Final%20Order_05052014_text.pdf.

relief valve support system that was “poorly designed” and “insufficient” to support predicted loads.⁴³

Several accidents have occurred on the Plantation Pipeline at issue in this notice letter. In November 2008, Plantation settled a Clean Water Act lawsuit over spills in three states for \$725,000.⁴⁴ Between 2000 and 2006, at least 42,200 gallons of fuel were spilled into streams in Virginia, Georgia, and North Carolina.⁴⁵ The lawsuit cited Plantation for the leaks and for its failure to develop a plan to prevent and control spills in an oil storage facility in Virginia.⁴⁶ Plantation committed to upgrading certain pipelines and improving inspection practices as part of the settlement agreement.⁴⁷ However, less than a year before the 2014 spill in Belton, improper installation and operation led to another 25,536-gallon spill along the Plantation Pipeline in Anderson, SC – resulting in \$1,170,300 in property damages.⁴⁸ Most recently, on July 6th, 2016, a new Plantation Pipeline leak was discovered in Goochland, VA, where the pipeline runs adjacent to Tuckahoe Creek.⁴⁹ In total, forty-seven incidents occurred along the Plantation Pipeline between 2006 and 2016, including five spills involving more than fifty barrels of petroleum product. 11,138 barrels (467,796 gallons) were spilled from Louisiana to Virginia, and \$22,234,724 worth of property was damaged.⁵⁰

Deferred maintenance may account for an increasing number of Kinder Morgan pipeline accidents along the Plantation Pipeline and across North America. The Pipeline and Hazardous Materials Safety Administration’s database indicates that faulty materials, welding, or equipment caused about 70% of incidents on the Plantation Pipeline in the last decade. Corrosion caused 4% of incidents, incorrect operation caused 17%, and weather events or other forces caused only 9% of incidents.⁵¹ In 2013, the Wall Street Journal reported that an investment analyst had charged Kinder Morgan with forgoing critical infrastructure maintenance in order to return more profit to investors.⁵² The company denied this claim, and chose to settle a lawsuit with shareholders rather than litigate the issue.⁵³ Whether or not the allegations are true, incidents on

⁴³ U.S. Dep’t of Transp., Office of Pipeline Safety, Failure Investigation Report: El Paso-Mojave GT 2012-5-2 (Mar. 14, 2013), <http://www.phmsa.dot.gov/staticfiles/PHMSA/PipelineFailureReports/EI%20Paso-Mojave%20GT%202012-5-2%20Redacted.pdf>.

⁴⁴ U.S. Dep’t of Justice, *Plantation Pipe Line Will Pay Penalty for Fuel Spills in Va., N.C., Ga.*, U.S. Dep’t of Justice, (Nov. 4, 2008), <https://www.justice.gov/archive/opa/pr/2008/November/08-enrd-980.html>.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ U.S. Dep’t of Transp., Incident and Mileage Data: Plantation Pipe Line Co. (Aug. 9, 2016, 11:16 PM), http://primis.phmsa.dot.gov/comm/reports/operator/OperatorIM_opid_15674.html?nocache=9146#_Incidents_tab_3

⁴⁹ Elliot Robinson, *Petroleum Leak Reported Along Goochland-Henrico Line*, Richmond Times-Dispatch (July 7, 2016, 10:30 PM), http://www.richmond.com/news/local/central-virginia/goochland/article_d75750d5-424f-591c-8da6-1c9b8673423e.html.

⁵⁰ U.S. Dep’t of Transp., Incident and Mileage Data: Plantation Pipe Line Co. (Oct. 6, 2016, 4:34 PM), http://primis.phmsa.dot.gov/comm/reports/operator/OperatorIM_opid_15674.html?nocache=9146#_Incidents_tab_3 (last visited Oct. 13, 2016).

⁵¹ *Id.*

⁵² Tom Fowler & Ben Lefebvre, *Is Kinder Morgan Scrimping on its Pipelines? The Market Shrugs*, The Wall Street Journal (Sep. 27, 2013, 1:48 PM), <http://blogs.wsj.com/corporate-intelligence/2013/09/27/is-kinder-morgan-scrimping-on-its-pipelines-the-market-shrugs/>.

⁵³ In re Kinder Morgan Energy Partners, L.P., <http://www.kindermorgancapexlitigationsettlement.com/> (last visited Oct. 21, 2016).

numerous Kinder Morgan pipelines demonstrate the company's consistent failure to operate in a way that safeguards human and environmental health.

To our knowledge, neither DHEC nor the U.S. Environmental Protection Agency ("EPA") has taken any enforcement action to address this massive spill in Belton.

Plantation has repeatedly delayed and violated deadlines for reports requested by DHEC. The Corrective Action Plan was originally due in April 2016.⁵⁴ DHEC denied Plantation's request to extend the deadline, but after the date passed, DHEC and Plantation representatives met in person and arranged a new due date of September 5, 2016.⁵⁵ The deadline for the Comprehensive Site Assessment was also pushed back several months.⁵⁶ Plantation later ignored DHEC's directive to submit a Pore Water Sampling Plan, originally due March 21, 2016.⁵⁷ After Plantation missed the deadline, DHEC issued a *Notice of Alleged Violation* and stated that they would pursue enforcement action if the new deadline of April 22 was not met.⁵⁸ The day before this deadline Plantation submitted a document explaining why they refused to comply with the pore water sampling request.⁵⁹ To our knowledge, DHEC has not taken further action to make Plantation produce a Pore Water Sampling Plan since Plantation submitted its refusal statement.

DESCRIPTION OF VIOLATIONS

Kinder Morgan and Plantation are violating the Clean Water Act ("CWA") by continuing to discharge pollutants from the spill site into the creeks, creek tributaries, and wetlands, and into groundwater that is hydrologically connected to nearby surface waters, and by not fully correcting and remediating these violations.

Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants from a point source to waters of the United States except in compliance with, among other conditions, a National Pollutant Discharge Elimination System ("NPDES") permit issued pursuant to § 402 of the CWA, 33 U.S.C. § 1342. Neither Kinder Morgan nor Plantation has an NPDES permit to authorize any of the discharges from the Plantation Pipeline that are described in this letter.

As described in the Background and Location of Violations section above, the illegal discharges from the Plantation Pipeline contain pollutants, including benzene, toluene, ethylbenzene, xylenes, MTBE, and naphthalene. According to documents provided by DHEC, these pollutants have already reached a tributary of Browns Creek at the locations described above. The petroleum and gasoline product also continues to flow both north and south through

⁵⁴ Letter to Jerry Aycock re. Assessment & Corrective Action Plan Directive (Mar. 21, 2016).

⁵⁵ Meeting Roster and Proposed Project Plan (May 2, 2016).

⁵⁶ The initial March 25, 2016 deadline, Letter to Jerry Aycock re. Assessment & Corrective Action Plan Directive (Mar. 21, 2016), was changed to September 5, 2016, Comprehensive Site Assessment Report: Lewis Drive Release Site 6-2 (2016).

⁵⁷ Notice of Alleged Violation (Mar. 21, 2016).

⁵⁸ *Id.*

⁵⁹ Response to Request for Pore Water Sampling Plan (Apr. 21, 2016).

hydrologically connected groundwater to Browns Creek, Browns Creek's tributaries and Fish Pond, Cupboard Creek, and wetlands surrounding the two creeks and their tributaries.

The CWA prohibits "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A). 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, [or] container . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). "[T]he touchstone for finding a point source is the ability to identify a discrete facility from which pollutants have escaped." *Wash. Wilderness Coal. v. Hecla Mining Co.*, 870 F. Supp. 983, 988 (E.D. Wash. 1994).

Here, the ruptured pipeline is a point source. The Plantation Pipeline leaked petroleum and gasoline products, which led to the contamination of the surrounding area.

In addition, the areas soaked with and contaminated by Kinder Morgan's leaked gasoline and petroleum products (hereinafter, the "Spill Site") are point sources. The products have not been removed, so they continue to flow from the Spill Site and discharge pollution into surface water and wetlands in violation of the Clean Water Act. United States District Courts in the Fourth Circuit and across the country have held that contaminated and contaminating "sites" like this one are point sources. *See generally Ohio Valley Env'tl. Coal., Inc. v. Hernshaw Partners, LLC*, 984 F. Supp. 2d 589, 598 (S.D.W. Va. 2013) ("the definition of a 'point source' is intended to be interpreted broadly, as indicated by the statute's 'including but not limited to' language," thus valley fills composed of coal mine waste material qualify); *North Carolina Shellfish Growers Ass'n v. Holly Ridge Assocs., LLC*, 278 F. Supp. 2d 654, 679-81 (E.D.N.C. 2003) (ditches, sediment traps, gullies, and rills are point sources, as is the "Morris Landing Tract [] itself" due to the construction activities that occurred there).

The Conservation Groups intend to enforce against two violations of the Clean Water Act. First, Plantation and Kinder Morgan are directly discharging pollutants, including benzene, toluene, ethylbenzene, xylenes, MTBE, naphthalene, and gasoline-related pollutants from the two point sources – the pipeline and Spill Site – into the surface waters of Browns Creek, Browns Creek's tributaries and Fish Pond, Cupboard Creek, and wetlands surrounding the two creeks and their tributaries. These direct unpermitted discharges occur as the petroleum product flows overland and through the soil into surface water.

Second, Plantation and Kinder Morgan are discharging pollutants, including benzene, toluene, ethylbenzene, xylenes, MTBE, naphthalene, and gasoline-related pollutants from the two point sources – the pipeline and Spill Site – through hydrologically connected groundwater that carries the pollutants into the surface waters of Browns Creek, Browns Creek's tributaries and Fish Pond, Cupboard Creek, and wetlands surrounding the two creeks and their tributaries.

The EPA has stated repeatedly that the CWA applies to such hydrologically-connected groundwater discharges. 66 Fed. Reg. 2960, 3015 (Jan. 12, 2001) ("EPA is restating that the Agency interprets the Clean Water Act to apply to discharges of pollutants from a point source via ground water that has a direct hydrologic connection to surface water."); *accord* 56 Fed. Reg. 64876-01, 64892 (Dec. 12, 1991) ("the Act requires NPDES permits for discharges to groundwater where there is a direct hydrological connection between groundwaters and surface

waters.”); 55 Fed. Reg. 47990, 47997 (Nov. 16, 1990) (announcing stormwater runoff rules and explaining that discharges to groundwater are covered by the rule where there is a hydrological connection between the groundwater and a nearby surface water body).

In a 1998 site report, EPA stated that “[a] documented ground water hydrological connection between a source and surface water discharge may be viewed as a conduit; or a discernible, confined, and discrete conveyance,” *i.e.*, a point source. U.S. EPA, Report on Hydrological Connection Associated with Molycorp Mining Activity, Questa, New Mexico, at 3 (Feb. 13, 1998). As a result, EPA has identified and regulated as point sources conduits or contaminated areas that convey pollutants into groundwater that discharge directly to neighboring surface waters – precisely the situation we have here.

In addition to EPA, “most courts . . . have held that groundwaters that are hydrologically connected to surface waters are regulated waters of the United States, and that unpermitted discharges into such groundwaters are prohibited under section 1311.” *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1319 (S.D. Iowa 1997).

These rulings include three recent decisions of United States District Courts in the Fourth Circuit. *Sierra Club v. Virginia Elec. & Power Co.*, 145 F. Supp. 3d 601, 607-08 (E.D. Va. 2015) (allowing CWA claim for unpermitted discharges to surface waters via hydrologically connected groundwater); *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428, 445 (M.D.N.C. 2015) (holding that coal ash lagoons are point sources and affirming CWA jurisdiction over the discharge of pollutants to navigable surface waters via hydrologically connected groundwater, which serves as a conduit between the point source and the navigable waters); *Ohio Valley Envtl. Coal. Inc. v. Pocahontas Land Corp.*, No. CIV.A. 3:14-11333, 2015 WL 2144905, at *8 (S.D.W. Va. May 7, 2015) (CWA jurisdiction includes discharges to surface water via hydrologically connected groundwater).

Numerous courts nationwide support this reasoning. *See, e.g., Waterkeeper All., Inc. v. U.S. E.P.A.*, 399 F.3d 486, 515 (2d Cir. 2005) (upholding EPA’s case-by-case approach to regulating feedlot pollutant discharges to surface waters through connected groundwater); *Quivira Mining Co. v. U.S. EPA*, 765 F.2d 126, 130 (10th Cir. 1985) (finding CWA coverage where discharges ultimately affected navigable-in-fact streams via underground flows); *U.S. Steel Corp. v. Train*, 556 F.2d 822, 852 (7th Cir. 1977) (CWA “authorizes EPA to regulate the disposal of pollutants into deep wells, at least when the regulation is undertaken in conjunction with limitations on the permittee’s discharges into surface waters.”), *overruled on other grounds by City of W. Chicago v. U.S. Nuclear Regulatory Comm’n*, 701 F.2d 632, 644 (7th Cir. 1983); *San Francisco Herring Ass’n v. Pac. Gas & Elec. Co.*, 81 F. Supp. 3d 847, 863 (N.D. Cal. 2015) (CWA jurisdiction over pollutant discharges through groundwater conduit to navigable waters); *Raritan Baykeeper, Inc. v. NL Indus., Inc.*, No. 09-CV-4117 JAP, 2013 WL 103880, at *15 (D.N.J. Jan. 8, 2013) (CWA covers hydrologically connected groundwater); *Hernandez v. Esso Std. Oil Co.*, 599 F. Supp. 2d 175, 181 (D.P.R. 2009) (“the CWA extends federal jurisdiction over groundwater that is hydrologically connected to surface waters that are themselves waters of the United States”); *Sierra Club v. El Paso Gold Mines, Inc.*, No. CIV.A.01 PC 2163 OES, 2002 WL 33932715, at *10 (D. Colo. Nov. 15, 2002) (citing EPA policy statement that “discharges from mine adits at historic or active mines [including seeps and other groundwater

discharges hydrologically connected to surface water from mines] are point sources subject to CWA liability for any amount of unpermitted discharge); *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1319-20 (S.D. Iowa 1997) (where groundwater flows toward surface waters, there is “more than the mere possibility that pollutants discharged into groundwater will enter ‘waters of the United States,’” and discharge of petroleum into this hydrologically-connected groundwater violates the CWA); *Washington Wilderness Coal. v. Hecla Mining Co.*, 870 F. Supp. 983, 990 (E.D. Wash. 1994) (“since the goal of the CWA is to protect the quality of surface waters, any pollutant which enters such waters, whether directly or through groundwater, is subject to regulation” under the CWA).

The pipeline and Spill Site qualify as continuing discharges so long as petroleum product remains in the environment and / or continues to reach surface water and wetlands – either directly or through hydrologically connected groundwater. See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S.49, 67-70 (1987) (Scalia, J., concurring in part and concurring in the judgment) (“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 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.”); *Am. Canoe Ass’n v. Murphy Farms*, 412 F.3d 536, 539 (4th Cir. 2005) (finding continuous violation even where defendant took remedial efforts because the efforts were insufficient to eliminate the “continuing likelihood of recurrence” of violations); *Ohio Valley Env’tl. Coal.*, 984 F. Supp. 2d at 598 (“One may continue to be in violation of the Clean Water Act even if the activities that caused the violations have ceased”); *Umatilla Waterquality Protective Ass’n, Inc. v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 1322 (D. Or. 1997) (“a discharge of pollutants is ongoing if the pollutants continue to reach navigable waters, even if the discharger is no longer adding pollutants to the point source itself”); *North Carolina Wildlife Fed’n v. Woodbury*, No. 87-584-CIV-5, 1989 WL 10517, at *2-*3 (E.D.N.C. Apr. 25, 1989) (holding that a tract with unremediated dredged and fill material was a continuing discharge).

Accordingly, the Clean Water Act applies to Plantation and Kinder Morgan’s unpermitted discharges from the Plantation Pipeline and the Spill Site that are discharging contaminated pollutants over soil and through hydrologically connected groundwater into surface waters. Because these permit violations are continuous and ongoing, they will continue after the date of this letter and the subsequent filing of a lawsuit.

PERSONS RESPONSIBLE FOR VIOLATIONS

Plantation Pipe Line Company, Inc. owns the Plantation Pipeline. Plantation Pipe Line Company is organized under the laws of Delaware, headquartered in Alpharetta, Georgia, and owned by Kinder Morgan Energy Partners, L.P. The Kinder Morgan limited partnership is organized under the laws of Delaware with its principal executive offices in Houston, Texas. Plantation Pipe Line and Kinder Morgan are responsible for all violations alleged herein.

PERSONS GIVING NOTICE

The Savannah Riverkeeper (the “Riverkeeper”) is a § 501(c)(3) non-profit public interest organization with members in Georgia and South Carolina operating in the Savannah River watershed.

Upstate Forever (“UF”) is a § 501(c)(3) non-profit public interest organization with members throughout South Carolina. Upstate Forever operates in the Upstate of South Carolina.

The Riverkeeper and UF and their members have been harmed by Plantation and Kinder Morgan’s unpermitted discharges and unlawful activities. These members recreate, fish, and own property in the Savannah River Basin, including in the immediate vicinity of and downstream from the site of the Plantation Pipeline spill, including Browns Creek, Cupboard Creek, associated wetlands and tributaries, and the waterways into which their waters flow. They fear contamination of drinking water, wildlife, and river water, by discharges from the Plantation Pipeline spill. Plantation and Kinder Morgan’s discharges of pollutants and contaminants from the Plantation Pipeline and the Spill Site are reducing the use and enjoyment by the Conservation Groups and their members of the Savannah River Basin, Browns Creek, Cupboard Creek, and the waterways into which their waters flow.

The names, addresses, and phone numbers of the persons giving notice are:

Ms. Tonya Bonitatibus, Riverkeeper / Executive Director
Savannah Rivekeeper
P.O. Box 14908
Augusta, GA 30919
706-826-8991

Ms. Andrea Cooper, Executive Director
Upstate Forever
507 Pettigru St.
Greenville, SC 29601
864-250-0500

The Riverkeeper and UF are prepared to file suit in the United States District Court for the District of South Carolina, or other appropriate court, pursuant to § 505(a) of the Clean Water Act, 33 U.S.C. § 1365(a)(1), after sixty days from the date of this letter. This lawsuit will seek injunctive relief, appropriate monetary penalties, fees and costs of litigation, and such other relief as the Court deems appropriate.

If you have any questions concerning this letter or the described violations, or if you believe this notice is incorrect in any respect, please contact the undersigned counsel, the Southern Environmental Law Center, at (843) 720-5270. During the notice period, we are available to discuss this matter with you, but suggest if you desire to institute negotiations in lieu of a civil action that you do so immediately as we do not intend to delay prosecution of this suit once the notice period has expired. Please be advised that the failure to remedy any of the violations set forth in this letter can result in a court order enjoining further violations and

imposing civil penalties of \$37,500 per violation, per day for each violation of the Clean Water Act, as well as attorneys' fees and costs.

Thank you for your prompt attention to this matter.

Sincerely,



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Enclosures

cc : The Honorable Heather McTeer Toney (*Via certified mail – return receipt requested*)
Beth Drake, Esq. (*Via certified mail – return receipt requested*)

