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## Solicitor General Asks Supreme Court to Review the Decisions Adopting the Groundwater as Conduit Theory

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In consideration of a request for a writ of certiorari in the cases *County of Maui v. Hawaii Wildlife Fund*, No. 18-260 and *Kinder Morgan Energy Partners v. Upstate Forever*, No. 18-268, the US Supreme Court invited the views of the United States on the question of whether the Clean Water Act (CWA) imposes liability for pollutants which travel through groundwater to ultimately reach jurisdictional navigable waters. On January 3, the United States Solicitor General responded to the Supreme Court's invitation, supporting the cert petition. This issue, also known as the "groundwater as conduit theory," reached the Supreme Court following a significant circuit split. Specifically, in *Hawai'i Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018), and *Upstate Forever v. Kinder Morgan Energy Partners*, 887 F.3d 637 (4th Cir. 2018), the [Ninth and Fourth circuits both held](#) that the CWA requires permits under the National Pollution Discharges Elimination System (NPDES) for discharges of pollutants into groundwater when those pollutants eventually reach navigable water. These courts [determined](#) that although the discharges did not directly enter navigable waters (which are clearly subject to CWA jurisdiction), the pollutants flowed through groundwater—not subject to the CWA's requirements—and eventually reached navigable waters, bringing them into the CWA's reach. Conversely, however, [the Sixth Circuit](#) rejected this theory, holding that NPDES permitting requirements do not apply to pollutants which are discharged into groundwater before eventually flowing into navigable waters. See *Kentucky Waterways Alliance v. Kentucky Utilities Company*, 905 F.3d 925 (6th Cir. 2018); *Tennessee Clean Water Network v. Tennessee Valley Authority*, 905 F.3d 436 (6th Cir. 2018).

Petitions for writ of certiorari were filed in both cases with the Supreme Court, which subsequently called for the view of the Solicitor General as to whether it should hear the cases. The United States' brief argued that the court should indeed review the key jurisdictional question raised in *County of Maui*, especially in light of the circuit split between the Ninth and Fourth circuits on the one hand and the Sixth Circuit on the other. Moreover, numerous district courts have also confronted this issue, reaching different conclusions. As the Solicitor General noted, the courts of appeals are "squarely in conflict," and that conflict warrants resolution by the Supreme Court.

In addition, the United States argued that the Supreme Court should grant the petition for writ of certiorari because the question presented has the potential to create unknown regulatory effects

and contradictory outcomes across the country. In particular, the implications for regulated parties are significant due to the high civil and criminal penalties for discharging without a permit under the CWA; thus, certainty is needed as to when NPDES permitting requirements attach to discharges to groundwater.

Finally, the United States noted that the Environmental Protection Agency (EPA) has requested comment on “whether pollutant discharges from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow that has a direct hydrological connection to the jurisdiction surface waters may be subject to CWA regulation.” 83 Fed. Reg. 7126 (Feb. 20, 2018). EPA expects to take further action within the next several weeks, which would allow the Supreme Court and the parties to have the benefit of EPA’s view of the issue.

Whether the Supreme Court will grant the petition for certiorari remains to be seen. However, there are many reasons to believe the Court will grant the petition—its call for the views of the Solicitor General; the significant circuit split; the importance and potentially wide-ranging impacts of conflicting interpretations of the CWA; and the need for clarity on this issue, both for the states which administer NPDES permits and for the regulated community. We will continue to follow this issue closely.