

In The
Supreme Court of the United States

COUNTY OF MAUI,

Petitioner,

v.

HAWAII WILDLIFE FUND; SIERRA CLUB –
MAUI GROUP; SURFRIDER FOUNDATION;
WEST MAUI PRESERVATION ASSOCIATION,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to Rule 15.8 of the Rules of this Court, Petitioner respectfully submits this Supplemental Brief to alert this Court to two recent decisions from the U.S. Court of Appeals for the Sixth Circuit that deepen the conflict in authority described in the Petition regarding the meaning of the Clean Water Act (CWA).

As explained in the Petition (at 18-24), there is a growing split in authority over the critical distinction that Congress drew in the CWA between point source and nonpoint source pollution. On one hand, this Court and several courts of appeals have read the CWA to distinguish between those two types of pollution based on an intuitive, bright-line test: point source pollution is delivered to navigable waters by means of a point source, whereas nonpoint source pollution is not. On the other hand, the Ninth Circuit concluded below that point source pollution sometimes includes pollutants that reach navigable waters by nonpoint sources, like groundwater, if the pollutants are “traceable” to a point source. That decision was joined in April of this year by a similar decision from the Fourth Circuit. See *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018), *petition for cert. filed*, 87 U.S.L.W. 3069 (U.S. Aug. 28, 2018) (No. 18-268).

This division in authority is both of extreme importance and the result of flawed reasoning. The Ninth Circuit’s decision has expanded the CWA’s point source permitting to millions of sources long regulated

as nonpoint sources of pollution, and injected significant uncertainty into a program that needs clarity and nationwide uniformity. See Pet. 30-36. It is also wrong. As set forth in the Petition (at 24-30), the Ninth Circuit’s decision cannot be squared with the CWA’s text, structure, context, or history. And it is premised on an erroneous reading of Justice Scalia’s plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), which only this Court can definitively put to rest.

Since the filing of the Petition, the Sixth Circuit has issued two decisions that deepen the conflict in authority—unequivocally rejecting the Ninth Circuit’s (and the Fourth Circuit’s) expansive view of point source pollution. See *Ky. Waterways All. v. Ky. Utils. Co.*, No. 18-5115, 2018 WL 4559315 (6th Cir. Sept. 24, 2018); *Tenn. Clean Water Network v. Tenn. Valley Auth.*, No. 17-6155, 2018 WL 4559103 (6th Cir. Sept. 24, 2018) (applying *Ky. Waterways*). Both cases involved pollutants escaping the disposal sites for coal ash, a byproduct of burning coal to produce electricity. In each case, the plaintiffs argued that there was point source pollution under the CWA because, as in this case, pollutants were entering groundwater and being carried by that groundwater to navigable waters. The Sixth Circuit refused this argument, expressly “disagree[ing] with the decisions from our sister circuits in *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, . . . , and *Hawai‘i Wildlife Fund v. Cty. of Maui*. . . .” *Ky. Waterways*, 2018 WL 4559315, at *5 (citations omitted).

In direct conflict with the Ninth and Fourth Circuits, the Sixth Circuit held that point source pollution

under the CWA includes only pollution that “make[s] its way to a navigable water . . . by virtue of a point-source conveyance.” *Id.* at *7. That does not cover pollution carried to navigable waters by groundwater, “which is a nonpoint-source conveyance.” *Ibid.* A CWA point source permit is not required for “pollutants [that] travel from a point source *through* nonpoint sources en route to navigable waters.” *Ibid.*

The Sixth Circuit’s reasoning tracks many of the arguments in the Petition. The court explained that its interpretation is compelled by the text of several provisions of the CWA, *id.* at *6-7, and consistent with the statute’s legislative history, *id.* at *10 n.10. It found support in the CWA’s “purpose of fostering cooperative federalism,” *id.* at *8, noting that the CWA “envision[s] significant state involvement in environmental regulation” and “leaves all forms of nonpoint-source pollution to state regulation,” *ibid.* In addition, the plaintiffs’ theory would “upend” and “effectively nullify” other environmental laws and regulations with which the CWA is intended to “work in tandem,” such as the Resource Conservation and Recovery Act (RCRA) and the Environmental Protection Agency’s rule under RCRA that specifically addresses coal ash storage and treatment, *id.* at *9.

The Sixth Circuit also explicitly rejected the reliance of the Ninth and Fourth Circuits on Justice Scalia’s plurality opinion in *Rapanos*. The court explained that those courts relied on a quotation “taken out of context in an effort to expand the scope of the

CWA well beyond what the *Rapanos* Court envisioned.” *Id.* at *8. Properly understood, Justice Scalia’s opinion does not support a point-source-to-nonpoint-source-to-navigable-water theory of pollution, but merely “make[s] clear” “that pollutants which travel through multiple *point sources* before discharging into navigable waters are still covered by the CWA” point source program. *Ibid.*

The Sixth Circuit’s decisions confirm in many ways the need for this Court’s prompt intervention. The Sixth Circuit is the third federal appeals court this calendar year to weigh in on the meaning of point source pollution under the CWA. And it has reached the third different interpretation of the statute. The Ninth Circuit below concluded that point source pollution under the CWA broadly reaches pollution that is “fairly traceable” to a point source and reaches navigable waters in more than *de minimis* amounts. App. 24. The Fourth Circuit similarly expanded the concept of point source pollution, but adopted a test expressly rejected by the Ninth Circuit: In the five states that make up that circuit, point source pollution under the CWA now exists where there is a “direct hydrological connection” between a point source and navigable waters. *Compare Upstate Forever*, 887 F.3d at 651 n.12, with App. 24 n.3. And the Sixth Circuit is the first this year to agree with this Court’s interpretation in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004). As noted in the Petition (at 35), recent CWA notices of intent to file

citizen suits make clear that more cases are on their way.* Guidance is desperately needed.

Moreover, the Sixth Circuit’s decisions involve a third type of pollutant source, highlighting the extraordinary reach of the question at issue. Underground injection wells, pipeline leaks, and coal ash disposal sites are just the tip of a very large iceberg that awaits millions of unsuspecting individuals and entities, who previously had no reason to be concerned with CWA point source permitting, if the decisions of the Ninth and Fourth Circuits stand. That is the kind of “enormous and transformative expansion” in regulatory authority that warrants this Court’s attention. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014).

Finally, the Sixth Circuit’s discussion of *Rapanos* shows clearly that the conflict in authority can only be resolved by this Court. As the Sixth Circuit recognized, both the Ninth and Fourth Circuits claim to find effectively controlling support for their rulings in Justice Scalia’s opinion in *Rapanos*. See App. 21-24; *Upstate Forever*, 887 F.3d at 649-50. That is a mistaken reading of the opinion, but also one that only this Court can definitively settle. This issue is as much about a faithful reading of the CWA’s text and history as it is about

* Indeed, complaints have followed from both of the notices specifically referenced in the Petition. See *Conservation Law Found., Inc. v. Longwood Venues & Destinations, Inc.*, No. 1:18-cv-11821 (D. Mass. filed Aug. 24, 2018); *Conservation Law Found., Inc. v. Wequassett Inn LLP*, No. 1:18-cv-11820 (D. Mass. filed Aug. 24, 2018).

the meaning of this Court's precedents. This Court's intervention is required, and urgently so.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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