

No. 18-260

IN THE
Supreme Court of the United States

COUNTY OF MAUI,

Petitioner,

v.

HAWAI‘I 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 RESPONDENTS

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November 20, 2018

Pursuant to Rule 15.8 of the Rules of this Court, Respondents respectfully submit this Supplemental Brief to alert this Court to a recent development in *Tenn. Clean Water Network v. Tenn. Valley Auth.*, 905 F.3d 436 (6th Cir. 2018) (No. 17-6155), *petition for rhrq. en banc filed* (Oct. 22, 2018), a decision on which Petitioner and its supporting amici rely to allege a conflict with the Ninth Circuit's holding that Clean Water Act liability may attach when a point source discharges pollutants to navigable water via a groundwater pathway that is the functional equivalent of a direct discharge to navigable waters. In its Reply filed November 6, 2018 (at 3), Petitioner sought to downplay the significance of the petition for rehearing en banc that is pending in *Tenn. Clean Water Network*, noting the Sixth Circuit had not yet requested a response in the initial two weeks after the petition was filed. On November 16, 2018, the Sixth Circuit called for a response, with the filing deadline set for November 30, 2018.

This development confirms that proceedings are ongoing before the Sixth Circuit, that the Sixth Circuit panel's holdings regarding Clean Water Act liability remain subject to change, and, accordingly, that Petitioner's allegation of a circuit split is premature.¹ While Petitioner claims a broader conflict, the Ninth, Fourth and Sixth Circuits are, as explained in our Brief in Opposition, the only courts of appeals that have specifically addressed discharges to navigable waters via a groundwater pathway that is functionally

¹ A petition for rehearing en banc also remains pending before the Sixth Circuit in *Ky. Waterways All. v. Ky. Utils. Co.*, 905 F.3d 925 (6th Cir. 2018) (No. 18-5115), *petition for rhrq. en banc filed* (Oct. 9, 2018), the other recent Sixth Circuit decision on which Petitioner and its supporting amici rely to allege a conflict.

equivalent to a direct discharge. Opp. at 16-23. Given that the only one of this handful of courts to disagree with the result below is continuing to consider the issue, Respondents respectfully submit that this Court should allow the law in the circuits to develop further before deciding whether review is appropriate.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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