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

RESPONDENTS' SECOND SUPPLEMENTAL BRIEF

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RULE 29.6 STATEMENT

The statement in the Respondents' Brief in Opposition remains accurate.

RESPONDENTS' SECOND SUPPLEMENTAL BRIEF

The amicus curiae brief of the United States confirms that it would be premature for this Court to consider now whether the Clean Water Act (CWA) regulates point-source discharges of pollutants to navigable waters through groundwater that are the functional equivalent of direct discharges to navigable waters. The United States declines to support Petitioner County of Maui's bald assertions that permitting in this context presents practical problems for the regulatory agencies or expands the scope of CWA regulation. *Cf.* Opp. 29-35. Instead, the United States urges review solely on the basis of an asserted conflict created by two recent decisions from the same divided panel of the Sixth Circuit. *See* U.S. Br. 10-12 (citing *Ky. Waterways All. v. Ky. Utils. Co.*, 905 F.3d 925 (6th Cir. 2018); *Tenn. Clean Water Network v. Tenn. Valley Auth.*, 905 F.3d 436 (6th Cir. 2018), petition for rhrg. en banc pending, No. 17-6155 (filed Oct. 22, 2018)).[1]

But the Sixth Circuit's prolonged consideration of a pending en banc petition indicates it may soon resolve the conflict its two-judge majority has created, without the need for this Court's intervention. And, regardless of the outcome of the Sixth Circuit petition, the United States' disclosure that EPA is on the brink of "tak[ing] further action" regarding CWA regulation

[1] The United States focuses on only the Sixth Circuit's two recent decisions; it does not adopt Petitioner's argument that appellate opinions prior to the recent Sixth Circuit panel decisions conflict with the decision below or the Fourth Circuit's decision.

of point-source discharges via groundwater provides compelling grounds to deny review. U.S. Br. 14. If the EPA reaffirms its longstanding view that permits are required in the context here, a future Sixth Circuit panel could defer to that view. If, on the other hand, the EPA takes some action to alter its view, questions will undoubtedly arise over whether that action is permissible, which this Court, as "a court of review, not of first view," should allow the lower courts to address in the first instance. *Decker v. Nw. Envt'l Def. Center*, 568 U.S. 597, 610 (2013) (citations and internal quotation marks omitted). Either way, this Court should deny the writ and allow the issue to percolate further.

ARGUMENT

A. The United States' Allegation of a Circuit Split Is Premature.

The petition for rehearing in *Tenn. Clean Water Network* remains pending before the Sixth Circuit, seeking en banc review of the panel's ruling that the CWA does not regulate point-source discharges that reach navigable waters via groundwater. *See* Resps. Supp. Br. 1. The United States is correct that, if the Sixth Circuit grants rehearing, the panel's decision in *Ky. Waterways All.* would not be vacated. U.S. Br. 12. But that is beside the point. What matters is that the Sixth Circuit's treatment of the petition in *Tenn. Clean Water Network* – the court called for a response to the petition, which presents only the CWA issue, and has

been deliberating for more than two months – indicates the court has not yet come to rest on this issue. A grant of rehearing in *Tenn. Clean Water Network* and an en banc decision reversing the panel would abrogate the analysis in *Ky. Waterways All.* and eliminate the circuit conflict.[2]

The United States' citation to district court cases in other circuits addressing point-source discharges that reach navigable waters through groundwater (U.S. Br. 13) only confirms that it is unnecessary for this Court to intervene now. There will continue to be periodic opportunities for the Court to address this issue in the future, if warranted.

B. EPA's Forthcoming Action Counsels Strongly Against Granting the Writ.

That granting review is unwarranted is further underscored by the United States' disclosure that EPA expects to take further action within the "next several weeks" regarding "the Act's applicability to discharges through groundwater," U.S. Br. 14, action that may take "the form of rulemaking." 83 Fed. Reg. 7,126, 7,128 (Feb. 20, 2018). The normal course when new agency action is expected regarding a disputed legal issue is to deny certiorari to see whether that action

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[2] The Sixth Circuit's denial of rehearing in *Ky. Waterways All.* does not shed any light on how it might resolve *Tenn. Clean Water Network*. The plaintiff did not seek rehearing in *Ky. Waterways All.* Instead, the defendant asked the court to reconsider only unrelated questions under the Resource Conservation and Recovery Act.

resolves the purported conflict over the issue. *See*, *e.g.*, U.S. Br. 10-11, 22-23, *Northrop Corp. Employee Ins. Benefit Plans Master Trust v. United States*, 568 U.S. 1048 (2012) (No. 11-1528) (recommending denial notwithstanding conflict because agency had made new regulatory action a "priority"); U.S. Br. 19-20, *Fein, Such, Kahn & Shepard v. Allen*, 565 U.S. 1177 (2012) (No. 10-1417) (same); U.S. Br. at 9, 18-19, *Providence Hosp. v. Moses*, 561 U.S. 1038 (2010) (No. 09-438) (recommending denial notwithstanding circuit split because relevant agency had "committed to initiating a rulemaking process" in the near future).

The Solicitor General offers no reason to chart a different course here. If anything, there is more reason here than usual for this Court to stand down. Only a single court of appeals (the Sixth Circuit) has stated that the CWA never covers point-source discharges reaching navigable waters through groundwater. And that court expressly stopped short of holding that construing the CWA otherwise would not be "a reasonable interpretation." *Ky. Waterways All.*, 905 F.3d at 938 (citation omitted). It merely opined that that its reading of the CWA was "the best one" and avoided disrupting "the existing regulatory framework." *Id.* at 937-38; *see also Tenn. Clean Water Network*, 905 F.3d at 446. If EPA reaffirms its longstanding view that permits are required in the context here, that action could allay concerns about disrupting the current regulatory framework and pave the way for the Sixth Circuit to defer to the agency's interpretation of the CWA. *See National Cable & Telecommunications Ass'n v. Brand*

X Internet Services, 545 U.S. 967, 984-85 (2005); *see*, *e.g.*, *Zhang v. Mukasey*, 543 F.3d 851, 857 (6th Cir. 2008). Such action on the Sixth Circuit's part would make the conflict on which the United States relies disappear.

If, on the other hand, EPA takes action to alter its longstanding interpretation, which it reiterated below, that the CWA regulates point-source discharges that – like Petitioner's daily discharges of millions of gallons of treated sewage – reach navigable waters via groundwater, certiorari would be even less appropriate. *See* U.S. CA9 Br. (Dkt. 40) 22-30. When an agency promulgates new guidance rescinding a previous position, that new action is often subject to administrative challenge on various levels. It may be procedurally defective, *see*, *e.g.*, *Envtl. Integrity Project v. Envtl. Prot. Agency*, 425 F.3d 992, 997-98 (D.C. Cir. 2005), "arbitrary and capricious," *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126-27 (2016), or simply "an impermissible construction of the statute," *Aid Ass'n for Lutherans v. U.S. Postal Service*, 321 F.3d 1166, 1178 (D.C. Cir. 2003). The parties may also dispute whether, or what form of, deference is appropriate for the new agency position. In short, the validity of the agency's action would present a new question that should be addressed in the lower courts before any request that this Court "consider [the agency's] views in deciding the [CWA] issue [presented here] on the merits." U.S. Br. 14.

Even if all of these problems could be put aside, granting certiorari would risk a repeat of the disruptive situation this Court faced in *Decker*, where EPA

finalized new CWA stormwater regulations only three days before the cases were argued, leaving the Court unable to provide any forward-looking guidance on the question presented. *See*, *e.g.*, *Decker*, 568 U.S. at 604, 610 ("no occasion to interpret" EPA's newly adopted CWA regulations). The United States implicitly suggests this case might be different because EPA will issue its new guidance here "before any brief on the merits is due." U.S. Br. 14. But even if – notwithstanding the ongoing government shutdown and inevitable administrative delays – EPA issues new guidance before briefs on the merits are filed, the needs of the adversarial process would be ill-served by granting certiorari with the knowledge that the parties and potential amici will not know the regulatory landscape until some undefined point in the briefing process.

In all events, initial scrutiny of EPA's action is properly the province of the lower courts. As this Court emphasized in *Decker*, the Court is "a court of review, not of first view." 568 U.S. at 610 (citations and internal quotation marks omitted). This Court should allow further development of the law before it considers whether its intervention is warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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