

No. 18-268

In the
Supreme Court of the United States

KINDER MORGAN ENERGY PARTNERS, L.P. and
PLANTATION PIPE LINE COMPANY, INC.,

Petitioners,

v.

UPSTATE FOREVER and SAVANNAH RIVERKEEPER,
Respondents.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit**

RESPONDENTS' SUPPLEMENTAL BRIEF

Frank S. Holleman III
Counsel of Record

Nicholas S. Torrey

Leslie Griffith

SOUTHERN ENVIRONMENTAL LAW CENTER

601 West Rosemary Street, Suite 220

Chapel Hill, North Carolina 27516

(919) 967-1450

fholleman@selcnc.org

Christopher K. DeScherer

SOUTHERN ENVIRONMENTAL LAW CENTER

463 King Street, Suite B

Charleston, South Carolina 29403

January 11, 2019

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
RULE 29.6 STATEMENT	1
INTRODUCTION	1
ARGUMENT	1
CONCLUSION	5

TABLE OF AUTHORITIES

Cases

<i>Concerned Area Residents for the Env't v. Southview Farm,</i> 34 F.3d 114 (2d Cir. 1994)	2
<i>Haw. Wildlife Fund v. Cty. of Maui,</i> 886 F.3d 737 (9th Cir. 2018)	2
<i>Ky. Waterways Alliance v. Ky. Utils. Co.,</i> 905 F.3d 925 (6th Cir. 2018)	3
<i>League of Wilderness Defs. v. Forsgren,</i> 309 F.3d 1181 (9th Cir. 2002)	2
<i>Peconic Baykeeper, Inc. v. Suffolk Cty.,</i> 600 F.3d 180 (2d Cir. 2010)	2
<i>Quivira Mining Co. v. EPA,</i> 765 F.2d 126 (10th Cir. 1985)	2
<i>Sierra Club v. Abston Constr. Co.,</i> 620 F.2d 41 (5th Cir. 1980)	2
<i>Tennessee Clean Water Network v. Tennessee Valley Authority,</i> 905 F.3d 436 (6th Cir. 2018)	2
<i>U.S. Steel Corp. v. Train,</i> 556 F.2d 822 (7th Cir. 1977)	2
<i>United States v. Smith,</i> 73 F.3d 1414 (6th Cir. 1996)	3

Waterkeeper All., Inc. v. EPA,
399 F.3d 486 (2d Cir. 2005) 2

Court Rules

6th Cir. R. 32.1..... 3

RULE 29.6 STATEMENT

The information stated in the Rule 29.6 statement in the Respondents' Brief in Opposition is unchanged.

INTRODUCTION

The brief of the United States confirms that the Court should deny certiorari. The United States agrees that the second question presented by Petitioners is not fit for certiorari. Even as to the first question, moreover, the United States identifies no settled circuit split. Rather, it relies exclusively on recent developments in the Sixth Circuit, where there is a pending en banc petition that could resolve the issue even in that one outlier court. Beyond that, the United States asks the Court to cut short the ongoing administrative review of EPA's longstanding position on the question presented and intervene before EPA can implement—and, equally important, before lower courts can review—any change in EPA's established interpretation. There is no need to short-circuit that process. Accordingly, the petition should be denied.

ARGUMENT

The United States confirms that the split Petitioners originally relied upon to urge certiorari is fictional. Pet. at 16–18. Its brief notably fails to cite the Fifth and Seventh Circuit cases upon which Petitioners mistakenly have relied. See Opp. at 14–15. And, in fact, the Fourth Circuit decision here accords with the rulings of many other circuits that the Clean Water Act protects against unpermitted point source discharges to navigable waters through groundwater. *Haw. Wildlife Fund v. Cty. of Maui*,

886 F.3d 737 (9th Cir. 2018); *Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 515 (2d Cir. 2005); *Quivira Mining Co. v. EPA*, 765 F.2d 126, 130 (10th Cir. 1985); *U.S. Steel Corp. v. Train*, 556 F.2d 822, 852 (7th Cir. 1977), *overruled on other grounds by City of W. Chi. v. U.S. Nuclear Regulatory Comm'n*, 701 F.2d 632, 644 (7th Cir. 1983). Still other courts have recognized the more general principle that the Clean Water Act does not require that a point source discharge directly into navigable waters to be covered by the Act. *Peconic Baykeeper, Inc. v. Suffolk Cty.*, 600 F.3d 180, 188–89 (2d Cir. 2010); *League of Wilderness Defs. v. Forsgren*, 309 F.3d 1181, 1185 (9th Cir. 2002); *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 119 (2d Cir. 1994); *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45 (5th Cir. 1980).

Nevertheless, the United States recommends that the Court grant certiorari in *Maui*, a Ninth Circuit case that reflects this overwhelming judicial and regulatory consensus. That recommendation depends entirely on its assertion of a circuit split between the Sixth Circuit and all the other circuits that have addressed this issue. That split would arise, however, only if the en banc Sixth Circuit fails to act to correct a panel decision departing from the consensus view. The Sixth Circuit has requested and received a response to the petition for rehearing, and it has now been pending for several months. See *Tennessee Clean Water Network v. Tennessee Valley Authority*, 905 F.3d 436 (6th Cir. 2018), *petition for reh'g pending*, No. 17-6155 (6th Cir. filed Oct. 22, 2018).

The United States notes that the Sixth Circuit denied the defendant utility's rehearing petition in *Kentucky Waterways Alliance v. Kentucky Utilities Co.*, 905 F.3d 925 (6th Cir. 2018), *petition for reh'g denied*, No. 18-5115 (6th Cir. Nov. 26, 2018). That denial is not relevant to the question presented here because the utility sought rehearing only on a separate topic. In any event, if the pending *Tennessee* petition is granted, not only would the panel's decision in the *Tennessee* case be vacated, but also the Sixth Circuit's subsequent en banc decision on the Clean Water Act question would become the controlling law in the Sixth Circuit. *See, e.g., United States v. Smith*, 73 F.3d 1414, 1418 (6th Cir. 1996) ("only the court sitting en banc may overrule a prior decision of a panel" (citation omitted)); 6th Cir. R. 32.1 ("A published opinion is overruled only by the court en banc.").

Moreover, even if a circuit split still exists when the dust settles in the Sixth Circuit, it would be a shallow one, with the Sixth Circuit's approach being an outlier in over four decades of Clean Water Act jurisprudence. In that situation, the Court should wait for the issue to develop further in the district and circuit courts.

The latter course of action would be particularly appropriate here, as it would allow those courts to review and evaluate in the first instance what the United States indicates is forthcoming EPA analysis on this issue. *See* U.S. Br. 14. If, after its review, EPA continues to acknowledge that the plain text of the Clean Water Act covers these discharges, then that decision would only reaffirm that the Fourth and Ninth Circuits correctly applied the Act and

would counsel against certiorari. But if EPA abandons or revises its position—or proposes to do so in the future—that would set off a chain of administrative consequences, potentially including a round of permit revisions, notice-and-comment rulemaking, and judicial review by lower courts. Thus, even if EPA eventually were to alter its position, denying certiorari would be appropriate to allow the agency to implement that change and the lower courts to respond to it.

Denying review also makes sense because, as the United States tacitly confirms, Petitioners' overheated predictions about potential impacts of the Fourth Circuit's decision lack substance. The United States' silence is understandable because the Fourth Circuit's decision reflects a decades-long status quo that has not resulted in the chaos of which Petitioners warn. As the United States explained in its amicus brief filed with the Ninth Circuit in the *Maui* case, "EPA and states have been issuing permits for this type of discharge" across many industries for decades. Am. Br. U.S., *Haw. Wildlife Fund*, Dkt. 16 at 30. Far from altering the existing regulatory landscape, the decisions below preserve it.

CONCLUSION

Neither question presented is fit for review, and the petitions in both this case and *Maui* should be denied.

Respectfully submitted,

Frank S. Holleman III

Counsel of Record

Nicholas S. Torrey

Leslie Griffith

SOUTHERN ENVIRONMENTAL LAW CENTER

601 West Rosemary Street, Suite 220

Chapel Hill, North Carolina 27516

(919) 967-1450

fholleman@selcnc.org

Christopher K. DeScherer

SOUTHERN ENVIRONMENTAL LAW CENTER

463 King Street, Suite B

Charleston, South Carolina 29403

(843) 720-5270

January 11, 2019