Nos. 18-260 and 18-268

In the Supreme Court of the United States

COUNTY OF MAUI, HAWAII, PETITIONER

v.

HAWAII WILDLIFE FUND, ET AL.

KINDER MORGAN ENERGY PARTNERS, L.P., ET AL., PETITIONERS

v.

UPSTATE FOREVER, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE NINTH AND FOURTH CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a "discharge of a pollutant," 33 U.S.C. 1362(12), occurs when a pollutant is released from a point source, travels through groundwater, and ultimately migrates to navigable waters.

2. Whether the Court should grant certiorari to address the other issues on which petitioners seek review.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari in No. 18-260 should be granted, limited to the first question presented in that petition—namely, whether a "discharge of a pollutant," 33 U.S.C. 1362(12)(A), occurs when a pollutant is released from a point source, travels through groundwater, and ultimately migrates to navigable waters.

The petition for a writ of certiorari in No. 18-268 should be held pending the Court's disposition of the petition in No. 18-260.

STATEMENT

1. Congress enacted the Clean Water Act (CWA or Act), 33 U.S.C. 1251 *et seq.*, to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. 1251(a), while "recogniz[ing], preserv[ing], and protect[ing] the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution," 33 U.S.C. 1251(b). Subject to certain exceptions that are not implicated here, Congress prohibited the "discharge of any pollutant" unless authorized by a permit issued in accordance with the Act. 33 U.S.C. 1311(a). The CWA defines the term "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12)(A). The Act defines the term "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7). It defines the term "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. 1362(14).

The CWA establishes permitting programs through which appropriate federal or state officials may authorize discharges of pollutants from point sources into the waters of the United States. Under the National Pollutant Discharge Elimination System (NPDES) program, the Environmental Protection Agency (EPA) may permit the discharge of pollutants other than dredged or

fill material. 33 U.S.C. 1342(a).* A State that meets certain statutory criteria may be authorized by the EPA to administer its own NPDES program. 33 U.S.C. 1342(b). When a State receives such authorization, the EPA retains oversight and enforcement authority. 33 U.S.C. 1319, 1342(d). As suggested by its name, the goal of the NPDES program is the elimination of uncontrolled point-source discharges to waters of the United States.

The CWA authorizes enforcement actions to be filed either by government officials, see 33 U.S.C. 1319, or by private citizens under specified circumstances, see 33 U.S.C. 1365. A citizen suit may be filed against a person "who is alleged to be in violation of" specified CWA requirements. 33 U.S.C. 1365(a)(1). The Court has construed that language to require "that citizen-plaintiffs allege a state of either continuous or intermittent violation—that is, a reasonable likelihood that a past polluter will continue to pollute in the future." *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987).

2. The citizen plaintiffs in these cases (respondents in this Court) allege that petitioners violated the CWA by discharging pollutants to navigable waters, as defined by the CWA, without NPDES permits.

a. The County of Maui owns and operates four wells at a wastewater treatment plant that processes four million gallons of sewage per day from approximately 40,000 people. 18-260 (*Maui*) Pet. App. 7. Treated wastewater is then injected via the County's wells into the groundwater, some of which enters the Pacific Ocean via submarine seeps. *Id.* at 7-9. Approximately

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* A separate permitting program established by Section 404 of the Clean Water Act, 33 U.S.C. 1344, which governs the discharge of dredged or fill material into navigable waters, is not implicated here.

"one out of every seven gallons of groundwater entering the ocean near [the plant] is comprised of effluent from the wells." *Id.* at 9. Those wells operate under permits that authorize injection of wastewater underground pursuant to the federal Safe Drinking Water Act, 42 U.S.C. 300f *et seq.* See *Maui* Pet. App. 37; *Maui* Pet. 7.

A number of organizations filed suit against the County, alleging that the County was violating the CWA by "discharging effluent through groundwater and into the ocean without the [NPDES] permit required." *Maui* Pet. App. 10-11. In a series of rulings, the district court found in favor of the plaintiffs, based in part on its determination that "[a] party is liable under the Clean Water Act if, without an NPDES permit, it indirectly discharges a pollutant into the ocean through a groundwater conduit." *Id.* at 56 (emphasis omitted); see *id.* at 32-84, 85-100. The court also held that the County could not assert a due process defense to the imposition of civil monetary penalties because it had received fair notice that its conduct was prohibited by the CWA. *Id.* at 101-119.

The Ninth Circuit affirmed. *Maui* Pet. App. 1-31. After concluding that each of the County's wells was a "point source" under the Act, *id.* at 13-16, the court addressed the County's argument that, in order for a CWA "discharge" to occur, "the point source itself must convey the pollutants *directly* into the navigable water," rather than indirectly through groundwater (as in the case of wastewater from the County's wells). *Id.* at 16. The court rejected the County's argument, holding that "an indirect discharge from a point source to a navigable water suffices for CWA liability to attach." *Id.* at 19.

In support of that conclusion, the Ninth Circuit relied in part on Justice Scalia's plurality opinion in *Rapanos* v. *United States*, 547 U.S. 715 (2006). In that opinion, the Ninth Circuit explained, "Justice Scalia recognized the CWA does not forbid the 'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters.'" *Maui* Pet. App. 21 (quoting *Rapanos*, 547 U.S. at 743) (internal quotation marks omitted). The Ninth Circuit also described the plurality opinion as "recogniz[ing] that 'from the time of the CWA's enactment, lower courts have held that the discharge into intermittent channels of any pollutant *that naturally washes downstream* likely violates § 1311(a), even if the pollutants discharged from a point source do not emit directly into covered waters, but pass through conveyances in between.'" *Id.* at 22 (quoting *Rapanos*, 547 U.S. at 743) (internal quotation marks omitted). While recognizing that the *Rapanos* plurality opinion was not "controlling," the court concluded that the opinion offered a "persuasive" argument that pollutants need not "be discharged 'directly' to navigable waters from a point source" to fall within the Act's coverage. *Id.* at 23.

The Ninth Circuit thus held the County liable under the CWA because:

> (1) the County discharged pollutants from a point source, (2) the pollutants are fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water, and (3) the pollutant levels reaching navigable water are more than *de minimis*.

Maui Pet. App. 24. The court viewed its "fairly traceable" standard (point 2 above) as more faithful to the

statute than an alternative standard, advocated by the United States in an *amicus* brief, that would have "requir[ed] a 'direct hydrological connection' between the point source and the navigable water." *Id.* at 24 n.3.

Finally, the Ninth Circuit held that the County had received "fair notice" that its conduct was governed by the CWA. *Maui* Pet. App. 29-30. The court found the text of the statute sufficiently clear to satisfy due process requirements. *Id.* at 30. The court also rejected the County's argument that "the state agency tasked with administering the NPDES permit program * * * has maintained [that] an NPDES permit is unnecessary for the wells," finding instead that the state agency "ha[d] not solidified its position." *Ibid.*

b. In 2014, an underground pipeline owned by a subsidiary of Kinder Morgan Energy Partners, L.P. (together with its subsidiary, Kinder Morgan) ruptured, spilling hundreds of thousands of gallons of gasoline in Anderson County, South Carolina. 18-268 (*Kinder*) Pet. App. 1-2, 6. Although the rupture was repaired, and much of the gasoline was recovered, "at least 160,000 gallons allegedly remain[] unrecovered." *Id.* at 6. Two conservation groups brought suit against Kinder Morgan under the CWA, alleging that the spill has caused gasoline and related contaminants to seep into nearby rivers, lakes, and wetlands, including the Savannah River. *Id.* at 6-7 & n.2. They also alleged "that a 'plume' of petroleum contaminants continues to migrate into these waterways years later through ground water and various natural formations at the spill site, including 'seeps, flows, fissures, and channels.'" *Id.* at 7.

The district court dismissed the suit. *Kinder* Pet. App. 54-73. In the court's view, the plaintiffs' complaint was inadequate because it "failed to allege any facts to

support the position that the pipeline discharged petroleum directly into navigable waters." *Id.* at 62. The court viewed that failure as fatal to the plaintiffs' claims, concluding that "[t]he migration of pollutants through soil and groundwater is nonpoint source pollution that is not within the purview of the CWA." *Ibid.* The court thus rejected the plaintiffs' argument that the Act "appl[ies] to claims involving discharge of pollution to groundwater that is hydrologically connected to surface waters." *Id.* at 72.

The Fourth Circuit vacated and remanded. *Kinder* Pet. App. 1-26. The court first observed that the CWA authorizes private citizens to file suit under the Act "only if the complaint alleges an ongoing violation," *id.* at 12 (citing *Gwaltney*, 484 U.S. at 64); see 33 U.S.C. 1365(a); p. 3, *supra*, a requirement the court understood to be "jurisdictional in nature," *Kinder* Pet. App. 12. The court then determined that the plaintiffs had properly alleged an ongoing CWA violation. The court explained that, although Kinder Morgan had "repaired the initial cause of the pollution," *id.* at 14, "[t]he plaintiffs claim that pollutants originating from [a] point source continue to be 'added' to bodies of water that allegedly are navigable waters under the Act," which in the court's view suffices "for a violation to be ongoing," *id.* at 15.

The Fourth Circuit then addressed the question "whether a discharge of a pollutant that moves through ground water before reaching navigable waters may constitute a discharge of a pollutant, within the meaning of the CWA." *Kinder* Pet. App. 19. The court answered that question in the affirmative, based on its view that "a discharge of a pollutant under the Act need not be a discharge 'directly' to a navigable water from a point

source." *Ibid.*; see *id.* at 19-20 (discussing Justice Scalia's plurality opinion in *Rapanos*). The court held that, where pollution originating at a point source "has migrated and is migrating through ground water to navigable waters," that movement qualifies as an "indirect discharge" covered by the CWA. *Id.* at 22.

The Fourth Circuit cautioned, however, that indirect discharges still "must be sufficiently connected to navigable waters to be covered under the Act." *Kinder* Pet. App. 22. The court held that discharges "through ground water" will give rise to CWA liability only where "the connection between a point source and navigable waters [is] clear." *Ibid.* That will be true, the court explained, only where there exists a "direct hydrological connection" between the point source and a navigable water. *Ibid.*; see *id.* at 24 n.12 (finding "no functional difference between the Ninth Circuit's fairly traceable concept and the direct hydrological connection concept"). Applying that test to the facts before it, the court concluded that the plaintiffs had adequately demonstrated a direct hydrological connection between the spill from Kinder Morgan's pipeline and the addition of gasoline to navigable waters nearby. *Id.* at 24-26.

Judge Floyd dissented. *Kinder* Pet. App. 27-51. In his view, the plaintiffs had failed to allege "an ongoing discharge of pollutants from a point source, because the only point source at issue—the pipeline—is not currently leaking or releasing any pollutants." *Id.* at 40; see *id.* at 41 ("[F]or there to be an *ongoing* CWA violation, a point source must currently be involved in the discharging activity."). Judge Floyd understood the plaintiffs to have alleged only the "[o]ngoing migration" of pollution "from a site contaminated by a past discharge." *Id.* at 44. Judge Floyd concluded that such

ongoing migrations are not covered by the CWA because "ongoing migration does not involve a point source," but instead "is, by definition, nonpoint source pollution, which is outside of the CWA's reach." *Ibid.*; see *id.* at 44-46 (point source not involved); *id.* at 46-48 (migration of pollutants is nonpoint-source pollution).

DISCUSSION

The CWA prohibits the unpermitted "discharge of [a] pollutant," 33 U.S.C. 1311(a), a term defined to include "any addition of any pollutant to navigable waters from any point source," 33 U.S.C. 1362(12)(A). The courts of appeals are divided on the question whether a CWA "discharge of a pollutant" occurs when pollutants are released from a point source to groundwater and migrate through, or are conveyed by, groundwater to navigable waters. The Court should resolve that important question. The other questions raised by petitioners, however, do not warrant review at this time.

A. Review Is Warranted To Resolve A Circuit Conflict On The Question Whether The CWA's Prohibition On The Unpermitted Discharge Of Pollutants Covers Activities That Cause Pollutants To Be Conveyed Through Groundwater To Waters Of The United States

1. The courts below addressed circumstances in which pollutants emitted from point sources reached the waters of the United States after migrating through groundwater. Both courts held that the emitting activities constituted pollutant "discharge[s]"—*i.e.*, "addition[s] of any pollutant to navigable waters from any point source," 33 U.S.C. 1362(12)(A).

The Ninth Circuit, under what it characterized as an "indirect discharge theory," *Maui* Pet. App. 20, held the County liable for its emission of treated wastewater

from a point source (four wells at a treatment plant) to the ocean via groundwater connecting them. In the court's view, because the wastewater was "fairly traceable" from the point source to the ocean, its release into the groundwater was "the functional equivalent of a discharge into the navigable water" itself. *Id.* at 24. The Fourth Circuit similarly held that leaked gasoline "pass[ing] from a point source" (a broken pipeline) "through ground water to navigable waters may support a claim under the CWA," *Kinder* Pet. App. 22, at least where the plaintiff has established a "direct hydrological connection" between the point source and the navigable waters, *ibid.* In support of those rulings, both courts relied in part on the same language from Justice Scalia's plurality opinion in *Rapanos* v. *United States*, 547 U.S. 715, 743 (2006). See *Maui* Pet. App. 21-24; *Kinder* Pet. App. 19-20.

The Sixth Circuit, by contrast, recently issued a pair of decisions holding that the prohibition on the "discharge of [a] pollutant" under Section 1311(a) was inapplicable under analogous circumstances. The plaintiffs in *Kentucky Waterways Alliance* v. *Kentucky Utilities Co.*, 905 F.3d 925 (6th Cir. 2018), brought suit under the Act against the operator of a coal-burning power plant that stored leftover coal ash in man-made ponds. *Id.* at 930-931. The plaintiffs alleged that, because the ponds sat atop porous karst terrain, "groundwater flows cause[d] the ash ponds to release pollutants into Herrington Lake." *Id.* at 931. The plaintiffs argued that the groundwater was "a medium through which pollutants pass before being discharged into navigable waters," thus establishing a "hydrological connection" between those waters and the introduction of coal ash into the ponds. *Id.* at 932-933.

The Sixth Circuit "disagree[d] with the decisions" of the Ninth and Fourth Circuits in the present cases, and it rejected the plaintiffs' theory of CWA liability for indirect pollutant discharges through groundwater. *Kentucky Waterways*, 905 F.3d at 933. In the court's view, that theory was "foreclose[d]" by the Act's text, which the court interpreted as applying only where pollution is added directly to navigable waters "by virtue of a point-source conveyance," rather than through some other mechanism. *Id.* at 934. The court regarded the plurality opinion in *Rapanos* as inapposite, stating that the opinion "answer[ed] an entirely different legal question" and addressed only the movement of pollutants via "intermediary point sources." *Id.* at 936. The Sixth Circuit noted that "other environmental statutes," such as the Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.*, are "specifically designed to cover solid waste" such as coal ash. *Kentucky Waterways*, 905 F.3d at 937-938. The court also viewed application of the CWA's permitting regime to discharges through groundwater as inconsistent with the CWA's "purpose of fostering cooperative federalism." *Id.* at 937.

The Sixth Circuit applied the reasoning of *Kentucky Waterways* in *Tennessee Clean Water Network* v. *Tennessee Valley Authority*, 905 F.3d 436 (2018), petition for reh'g pending, No. 17-6155 (filed Oct. 22, 2018), which also involved allegations that pollutants from coal ash ponds had been conveyed through groundwater into navigable waters (there, the Cumberland River), *id.* at 438. The court reiterated its view that the there was no "discharge of a pollutant" under those circumstances because, "when the pollutants are discharged to the river, they are not coming from a point source; they are coming from groundwater which is a nonpoint-source

conveyance." *Id.* at 444 (citation and emphasis omitted). The court again found the *Rapanos* plurality opinion to be inapposite, *id.* at 444-445, and it again viewed the plaintiffs' theory as inconsistent with other federal environmental statutes and with Congress's goal of preserving a primary role for state protection of groundwater, *id.* at 445-446.

2. The courts of appeals thus are squarely in conflict on the proper reading of the CWA's definition of the term "discharge of a pollutant." 33 U.S.C. 1362(12)(A). In particular, the circuits have disagreed on the question whether that term encompasses situations where pollutants are released from point sources but subsequently migrate to navigable waters through groundwater. That conflict warrants resolution by this Court.

Respondents argue that this Court's resolution of the conflict is presently unnecessary because a petition for rehearing remains pending in *Tennessee Clean Water Network*. See *Maui* Br. in Opp. 17; *Kinder* Br. in Opp. 1-2. But even if the petition for rehearing were granted, thereby vacating the panel's decision, see 6th Cir. R. 35(b), the Sixth Circuit's decision in *Kentucky Waterways*—as to which a separate petition for rehearing (No. 18-5115) was denied on November 26, 2018—would remain in force.

Respondents in *Maui* also contend that the Sixth Circuit's decisions "strongly suggested that the coal ash ponds were not point sources to begin with," and that "[t]he absence of any point source [would be] an independent ground for concluding no CWA liability exists." *Maui* Br. in Opp. 18. In a footnote in its *Kentucky Waterways* opinion, the Sixth Circuit expressed "doubt" that coal ash ponds are point sources, 905 F.3d at 934 n.8, but it did not resolve the issue or rest its decision

on that ground. And in *Tennessee Clean Water Network*, the court was even more explicit that it "d[id] not base [its] decision" on that argument. 905 F.3d at 443 n.6. The Sixth Circuit's reference to the possible nonpoint-source status of coal ash ponds thus was not an alternative ground for the judgments in those cases, but is at most an additional argument that might be available to the defendants if this Court grants certiorari and disagrees with the Sixth Circuit's interpretation of Section 1362(12)(A).

The circuit conflict is important. In addition to the Fourth, Sixth, and Ninth Circuit decisions described above, numerous district courts have confronted cases involving "claim[s] that unpermitted wastes are reaching 'waters of the United States' by migration through groundwater that is hydrologically connected." *Hernandez* v. *Esso Standard Oil Co.*, 599 F. Supp. 2d 175, 179 (D.P.R. 2009) (emphasis omitted); see *26 Crown Assocs., LLC* v. *Greater New Haven Reg'l Water Pollution Control Auth.*, No. 15-cv-1439, 2017 WL 2960506, at *8-*9 (D. Conn. July 11, 2017), appeal pending, No. 17-2426 (2d Cir. argued Apr. 18, 2018); *Sierra Club* v. *Virginia Elec. & Power Co.*, 145 F. Supp. 3d 601, 607 (E.D. Va. 2015) (citing decisions on both sides of the "split"). As those cases illustrate, the CWA applies to an expansive range of "pollutant[s]," 33 U.S.C. 1362(6), discharged from a broad variety of "point source[s]," 33 U.S.C. 1362(14). Given the potential breadth of those provisions, and the ways in which groundwater may be connected to navigable waters, the question presented here has the potential to affect federal, state, and tribal regulatory efforts in innumerable circumstances nationwide. The implications for regulated parties are also significant, including because CWA violators may face

serious civil penalties and, in certain cases, criminal punishment. See 33 U.S.C. 1319; see also 33 U.S.C. 1342(b)(7).

3. On February 20, 2018, the EPA requested comment on "whether pollutant discharges from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow that has a direct hydrologic connection to the jurisdictional surface water may be subject to CWA regulation." 83 Fed. Reg. 7126, 7126. The EPA noted that federal courts had disagreed about the Act's applicability to discharges through groundwater, *id.* at 7127-7128, and it requested comment from Tribes, States, members of the public, and other interested stakeholders regarding whether and to what extent "subjecting such releases to CWA permitting is consistent with the text, structure, and purposes of the CWA," *id.* at 7128. The EPA explained that its request was intended to facilitate possible further agency action, potentially including "memoranda, guidance, or in the form of rulemaking," which the agency could use to "provide additional certainty for the public and the regulated community." *Ibid.*

Contrary to respondents' arguments, *Maui* Br. in Opp. 2, 24; *Kinder* Br. in Opp. 28, the review process initiated by the agency's request for comment is not an appropriate reason to deny certiorari here. The EPA has informed this Office that it expects to take further action, reflecting the results of its review, within the next several weeks. If the Court grants one or both of the petitions, the parties therefore should have the benefit of the EPA's views before any brief on the merits is due, and the Court can consider those views in deciding the issue on the merits.

4. Of the two certiorari petitions currently before the Court, the *Maui* petition provides the better vehicle for resolving the circuit conflict. The determination whether the plaintiffs in that case had stated a cognizable claim turned entirely on whether, as the Ninth Circuit held, the CWA's prohibition on the discharge of pollutants governs the release of pollutants from a point source "into groundwater, through which the pollutants then enter a 'navigable water.'" *Maui* Pet. App. 13 (brackets omitted). Neither the court's opinion in *Maui*, nor respondents' brief in opposition, identifies any obstacle to this Court's resolution of that issue if the Court grants review.

In *Kinder*, by contrast, the Fourth Circuit addressed the merits of the indirect-discharge theory only after concluding that the plaintiffs had properly alleged "an ongoing violation" sufficient to confer "'jurisdiction' over [a] CWA citizen suit[]." *Kinder* Pet. App. 12 (quoting *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 64 (1987)). Based on its understanding of that issue as being "jurisdictional in nature," the Fourth Circuit felt compelled to "address the question of an ongoing violation before proceeding further" on the application of the CWA's citizen-suit provision to indirect discharges through groundwater. *Ibid.* The dissenting judge, who likewise viewed the ongoing nature of the alleged violation as essential to the court's jurisdiction, did not squarely address the question whether a CWA violation had occurred because he concluded that any violation was no longer ongoing. See *id.* at 40-51 (Floyd, J., dissenting).

The parties in *Kinder* dispute whether the requirement of an ongoing violation is a jurisdictional prerequisite to a CWA citizen suit. Although petitioners argue

that respondents did not properly allege an ongoing violation, and that this failure provides an independent basis for dismissal of their suit, *Kinder* Pet. 29-37, petitioners contend that the ongoing-violation requirement is not "jurisdictional in the strict sense of the term," *Kinder* Reply Br. 10 n.4. Respondents, by contrast, argue that the ongoing-violation requirement *is* jurisdictional but that they adequately alleged an ongoing violation here. See *Kinder* Br. in Opp. 32-33.

If the Court granted review in *Kinder*, it would need at least to determine whether the ongoing-violation requirement is jurisdictional, and (if the Court answered that question in the affirmative) potentially to decide whether the conduct that respondents have alleged would amount to an ongoing violation. Neither of those questions independently warrants this Court's review. See pp. 18-19, *infra*. And if the Court agreed with respondents that an ongoing violation is a jurisdictional prerequisite, but agreed with petitioners that no such ongoing violation exists under the particular circumstances of the case, it could not resolve the far more important question whether the CWA applies to indirect discharges through groundwater.

The *Maui* petition is also a better vehicle for resolving that question because the pollutants in that case (treated wastewater) migrated to jurisdictional waters (the ocean) *solely* via groundwater connected to a point source (the wells). See *Maui* Pet. App. 8-10. The gasoline at issue in *Kinder*, by contrast, entered "navigable waters by seeping from a point source over a distance of 1000 feet or less *through soil and ground water* to nearby tributaries and wetlands." *Kinder* Pet. App. 9 (emphasis added); see *id.* at 63 ("[T]he contaminants are migrating through the soil and groundwater at the spill

site."). Because numerous provisions of the CWA and other laws separately address the treatment of groundwater, see, *e.g.*, 33 U.S.C. 1252(a), 1254(a)(5), 1282(b)(2), 1288(b)(2), 1314(a) and (f), 1329, the migration of pollutants through groundwater may raise distinct regulatory concerns. For that reason, the EPA's February 2018 request for comment had a special focus on pollutants that reach jurisdictional surface waters via groundwater. See 83 Fed. Reg. at 7128 (asking commenters to discuss whether releases into groundwater "would be better addressed through other federal authorities as opposed to the NPDES permit program," or "through existing state statutory or regulatory programs"). The Court's review should similarly focus on the question whether 33 U.S.C. 1311(a) applies when pollutants that are emitted from a point source reach navigable waters after traveling through groundwater.

B. The Court Should Not Review The Other Questions Presented By Petitioners

Each of the certiorari petitions raises an additional question, but neither warrants this Court's review.

1. The *Maui* petition asks the Court to determine whether, even if the CWA applies, "the County of Maui had fair notice that a CWA permit was required for its underground injection control wells that operated without such a permit for nearly 40 years." *Maui* Pet. i. It argues that the County lacked such notice in light of its "long regulatory history" with state and federal permitting processes, including its past communications with federal and state officials. *Id.* at 37; see *id.* at 37-38. The *Maui* petition does not assert that the Ninth Circuit's fair-notice holding conflicts with any decision of another court of appeals, but contends only that the

holding was incorrect under "a straightforward application of" existing case law. *Id.* at 36.

The district court correctly treated the notice issue as relevant, not to the determination whether the plaintiffs' citizen suit could go forward, but to the decision whether civil monetary penalties could be imposed once the County had been found liable. See *Maui* Pet. App. 103, 107-108. The existence of fair notice thus is not a prerequisite to the suit, let alone a jurisdictional prerequisite. If the Court grants review in *Maui* and holds that petitioner's pollutant releases were not subject to the CWA's permitting requirements, petitioner's claim that it lacked fair notice of the Ninth Circuit's contrary view will be rendered moot. If the Court instead holds on the merits that the CWA applies in these circumstances, that decision will provide clear notice going forward that future pollutant releases into the County's wells will require a NPDES permit. In either event, the parties' factbound dispute about the adequacy of the notice that the County *previously* received raises no legal question of continuing importance.

2. The *Kinder* petitioners ask the Court to decide "[w]hether an 'ongoing violation' of the [CWA] exists for purposes of the Act's citizen-suit provision when a point source has permanently ceased discharging pollutants, but some of the pollutants are still reaching navigable water through groundwater." *Kinder* Pet. i. They contend that the Fourth Circuit, by ruling that the alleged CWA violation remains ongoing as long as "pollutants originating from [a] point source continue to be 'added' to bodies of water that allegedly are navigable waters under the Act," *Kinder* Pet. App. 15, created a conflict with the Fifth Circuit's decision in *Hamker* v. *Diamond*

Shamrock Chemical Co., 756 F.2d 392 (1985). See *Kinder* Pet. 33.

As the Fourth Circuit recognized, however, *Hamker* was "based on materially different facts." *Kinder* Pet. App. 17. The plaintiffs there alleged that gasoline from the defendant's pipeline had leaked into ground water and had caused "lasting damage to grasslands," *Hamker*, 756 F.2d at 397, but they did not allege that the defendants had added pollutants to navigable waters, as defined by the Act. Indeed, the *Hamker* court appeared to assume that groundwater was *itself* a navigable water. See *ibid.*; but see *Kinder* Pet. App. 12 n.5, 26 (declining to endorse that proposition). The Fifth Circuit nevertheless found the complaint defective because "[n]o continuing addition to the ground water from a point source [w]as alleged." *Hamker*, 756 F.2d at 397. The Fourth Circuit, by contrast, relied on allegations "that pollutants *continue to be added to* navigable waters," such as the Savannah River. *Kinder* Pet. App. 18. The *Kinder* petitioners identify no reason to assume that the Fifth Circuit would have rejected a claim of an ongoing CWA violation under those circumstances.

CONCLUSION

The petition for a writ of certiorari in No. 18-260 should be granted, limited to the first question presented, and the petition for a writ of certiorari in 18-268 should be held pending the Court's disposition of the petition in No. 18-260.

Respectfully submitted.

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JANUARY 2019