

Justices Request the Government's Views on CWA Discharge Cases

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On December 3, 2018, the U.S. Supreme Court [requested](#) the federal government's views on two petitions for certiorari asking the Court to decide whether the Clean Water Act (CWA) regulates releases of pollutants that reach surface waters through groundwater. In both cases, [County of Maui v. Hawaii Wildlife Fund](#) and [Kinder Morgan Energy Partners, L.P. v. Upstate Forever](#), the petitioners seek review of lower court decisions holding that such releases are subject to the CWA's prohibition against unpermitted discharges. The government's briefs, which are due January 4, 2019, may offer the first glimpse into the government's current position on this aspect of the CWA.

The federal courts of appeals are currently split on whether the CWA regulates releases to groundwater that eventually reach jurisdictional surface waters. In the *Maui* and *Kinder Morgan* cases, the Ninth and Fourth Circuits both concluded that a point source need not directly deliver pollutants to surface waters, such that a discharge to groundwater may be regulated under the CWA. By contrast, the Sixth Circuit held in a pair of September [decisions](#) that the CWA's definition of "discharge" requires that a point source directly deliver pollutants to surface waters.

While these cases have worked their way through the courts, EPA has also suggested it may take action on this issue. Earlier this spring, the agency [asked](#) for public comment on whether the CWA regulates discharges reaching surface waters via groundwater. EPA also solicited comment on how, if at all, such discharges should be regulated.

The government's forthcoming briefs may provide insight into what further action EPA might take and where the current administration stands on this issue. The briefs might advise the court that EPA plans to take regulatory action to address the issue raised in the petitions for certiorari, which would militate against the Supreme Court granting review.

The government could also preview its position on the merits. EPA has not weighed in on the substance of this issue since filing an amicus brief in the Ninth Circuit *Maui* case during the Obama administration. That brief argued that the CWA applies to releases to groundwater that has a “direct hydrologic” connection to surface waters, a position that the Ninth Circuit rejected in favor of a broader holding. The briefs requested by the Supreme Court may provide the first indication of how the EPA will approach this set of issues now that President Trump is in office.

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