

February 20, 2018

EPA Seeks Comments After Controversial Ninth Circuit Decision

In response to the Ninth Circuit's recent opinion in *Hawai'i Wildlife Fund v. County of Maui*, the U.S. Environmental Protection Agency ("EPA") is now seeking public comments on the proper scope of its authority under the Clean Water Act ("CWA"). In brief, the Ninth Circuit held that discharges of pollutants from a point source to navigable waters are regulated by the CWA regardless of whether the pollutant enters navigable waters directly or indirectly from another source, such as groundwater (see our client alert on the *Hawai'i Wildlife Fund* case [here](#)).

In its [Request for Comment](#),¹ the EPA explained that conflicting court decisions and past EPA statements in rulemakings, permitting actions, and guidance documents have raised questions about whether releases to groundwater or other subsurface flow that reach jurisdictional surface waters should be subject to CWA jurisdiction.

In the past, the EPA has stated that discharges of pollutants from point sources that reach jurisdictional surface waters from groundwater or other subsurface flows may be subject to CWA permitting requirements. Recent court decisions, such as *Hawai'i Wildlife Fund*, illustrate how the EPA has applied a variety of interpretations in the past. As such, the EPA is specifically seeking comments on whether it should review and potentially revise its previous statements concerning whether the CWA's National Discharge Pollutant Elimination System permitting program should apply to such discharges.

Entities that discharge from a point source to groundwater or other subsurface flows may be affected by any clarification the EPA issues on this topic and are encouraged to submit comments. Absent EPA clarification on the issue, future judicial decisions will likely create greater uncertainty, particularly if the holdings or rationale conflict with those of other courts.

Comments are due to the EPA on or before May 21, 2018. Please contact one of the Brownstein Hyatt Farber Schreck professionals below for more information.

¹83 Fed. Reg. 7,126 (Feb. 20, 2018).

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This document is intended to provide you with general information regarding the EPA's response to the Ninth Circuit's decision in Hawai'i Wildlife Fund v. County of Maui. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorneys listed or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.