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For more information,
contact:

Patricia Barmeyer

+1 404 572 3563

pbarmeyer@kslaw.com

Lewis B. Jones

+1 404 572 2742

lbjones@kslaw.com

John Fortuna

+1 404 572 2828

jfortuna@kslaw.com

Peter Hsiao

+1 213 443 4379

p hsiao@kslaw.com

Ilana Saltzbar

+1 202 626 3745

isaltzbar@kslaw.com

King & Spalding

Atlanta

1180 Peachtree Street, NE
Atlanta, Georgia 30309-3521

Tel: +1 404 572 4600

Los Angeles

633 West Fifth Street
Suite 1600

Los Angeles, CA 90071

Tel: +1 213 443 4355

Washington, D.C.

1700 Pennsylvania Avenue, NW
Washington, D.C. 20006-4707

Tel: +1 202 737 0500

EPA Rejects Clean Water Act “Conduit Theory”

Whether a discharge to groundwater that results in pollution of jurisdictional surface waters is regulated under the Clean Water Act (the “CWA”) is the subject of much debate, conflicting decisions from the Circuit Courts of Appeal, and a pending case in the United States Supreme Court.

The Environmental Protection Agency has now staked out its position—that a discharge to groundwater is *never* subject to regulation under the Clean Water Act—in a guidance document signed April 12, 2019 and posted on its website April 15. The guidance document is available at <https://www.epa.gov/npd/es/releases-point-source-groundwater> and will be published in the Federal Register.

The issue has widespread potential impact, as the conduit theory has been asserted to require CWA regulation of discharges into groundwater from ash ponds, landfills, septic tanks, land application systems, and even accidental releases, so long as the pollutants eventually make their way to surface waters.

RECENT CASES SPLIT ON THE “CONDUIT THEORY”; THE SUPREME COURT IS SET TO SETTLE THE ISSUE

In 2018 the Ninth Circuit held that a discharge of wastewater into groundwater that was demonstrated to flow into the Pacific Ocean violated the Clean Water Act. *Hawai’i Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018) (“*County of Maui case*”). The Fourth Circuit also adopted the “conduit theory” of liability, holding that the CWA covers an accidental release of petroleum to groundwater with a direct hydrological connection to jurisdictional surface waters. *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 886 F.3d 637 (4th Cir. 2018). On the other hand, the Sixth Circuit squarely rejected the conduit theory of liability under the CWA. *Kentucky Waterways Alliance v. Kentucky Utilities Co.*, 905 F.3d 925 (6th Cir. 2018).

Petitions for certiorari were filed in both the Ninth Circuit and Fourth Circuit cases. As urged by the amicus brief filed by the United States at



the request of the Court, the Supreme Court granted certiorari in the *County of Maui* case, and the case will be heard next term.

EPA RECONSIDERS ITS POSITION, NOW REJECTS THE “CONDUIT THEORY”

EPA has a history of mixed and conflicting positions on the conduit theory. As recently as 2017, in its amicus brief in the *County of Maui* case, EPA advocated in favor of this theory. EPA acknowledges in the new guidance document that this has generated confusion in the courts and uncertainty for EPA regional offices, states, the regulated community, and the public.

In February 2018, after the Ninth Circuit decision in the *County of Maui* case, EPA sought public comment on the question: “whether the NPDES permit program applies to releases of pollutants to groundwater and whether [EPA] should revise or clarify its position on this issue.” After considering the comments received and reviewing the legislative history and subsequent interpretations and case law, EPA has issued its interpretive statement.

EPA now concludes that “the best, if not the only, reading of the CWA is that Congress intentionally chose to exclude *all* releases of pollutants to groundwater from the NPDES [CWA permit] program, even where pollutants are conveyed to jurisdictional surface waters via groundwater.” In EPA’s view, Congress intended for states to have the discretion whether to regulate such releases, or not. EPA’s interpretation is based on its consideration of the text of the statute as well as its extensive legislative history. The guidance document reviews and acknowledges EPA’s prior assertions that discharges to groundwater are regulated under the CWA where there is a direct hydrologic connection to jurisdictional surface waters but now concludes that the statute does not support that theory.

The guidance document is just that—guidance, not a rule adopted after notice and public comment. As a result, it does not have the force of law. Rather, the document is explicit in its intent to provide the Supreme Court with an extensive explanation of EPA’s interpretation of the CWA—more extensive than could be set forth in an amicus brief—as the *County of Maui* case proceeds to briefing and then consideration by the Court. After the Supreme Court decision in that case, EPA intends to proceed to formal notice and comment rulemaking.

King & Spalding’s lawyers are closely watching this issue as it develops. Please contact any of the attorneys listed above for more information. For background information, see previous client alerts from [Supreme Court and EPA to Address Broad Expansion of Clean Water Act Liability by Lower Courts](#) and [As Ninth Circuit Expands Clean Water Act Liability for Groundwater Discharges, EPA Seeks Comment on Clean Water Act Coverage](#).

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