Agricultural Environmental Law Update

Anthony B. Schutz
Associate Professor of Law
University of Nebraska College of Law
402-472-1248
anthony@unl.edu

American Agricultural Law Association
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Dicamba

Arkansas: https://www.arktimes.com/arkansas/farmer-vs-farmer/Content?oid=8526754 (with links at end for newer reports)

Popular media:
https://www.agweb.com/article/dicamba-regulations-tighten-naa-sonja-begemann/ (lists state restrictions as of January 2018)
https://www.npr.org/tags/487977238/dicamba

Obviously, Dicamba deserves a broader discussion than can be accomplished in our brief update. A simple search for "dicamba" in All State & Federal database on westlaw generated eight opinions during the reporting period.

One of the more recent reported opinions on westlaw (not the Arkansas Supreme Court's opinion that effectively reinstated the ban in that state), is **Bader Farms, Inc. v. Monsanto**, 2018 WL 1784394 (April 13, 2018), in which the court dealt with a BASF motion to dismiss. The court beings with a helpful summary that is worth quoting:

> Plaintiffs' fraudulent concealment count will be dismissed entirely because plaintiffs failed to plead reliance. Plaintiffs' negligence-based counts that seek to hold BASF liable for 2015 and 2016 damage also are dismissed for two reasons. First, BASF did not have a dicamba herbicide approved for in-crop, over-the-top, use on the market until late 2016. So it did not independently cause any 2015 or 2016 damage. Second, it cannot be held liable for its co-conspirator Monsanto's negligent acts under an acts-of-a-co-conspirator theory. Thus, BASF may be held liable for the 2015 and 2016 damage only if plaintiffs eventually show (1) Monsanto and BASF entered into a conspiracy and (2) the 2015 and 2016 damage flowed naturally from that conspiracy.

> Finally, plaintiffs may assert all claims (except fraudulent concealment) against BASF for any damage allegedly caused by its new dicamba herbicide in 2017.

Bader Farms also resulted in an interesting opinion back in April 2017. This opinion was described here (with link to opinion). That opinion was vacated in June 2017, allowing the plaintiff to amend its pleading to allege that third-party sprayers and applicators were part of a conspiracy with Monsanto, or were at least carrying out their direction to apply Dicamba to Xtend crops.

In re: Dicamba Herbicides Litigation, 289 F. Supp. 3d 1345 (US MDL Panel, Feb 1, 2018), concluded that centralization of nine actions pending in five districts was warranted and located the matters in the Eastern District of Missouri. The cases are as follows:

> Eastern District of Arkansas
> WHITEHEAD FARMS, ET AL. v. MONSANTO COMPANY, ET AL., C.A. No. 2:17–00168
> BRUCE FARMS PARTNERSHIP, ET AL. v. MONSANTO COMPANY, ET AL., C.A. No. 3:17–00154
>
> Southern District of Illinois
> WARREN, ET AL. v. MONSANTO COMPANY, ET AL., C.A. No. 3:17–00973
>
> District of Kansas
> CLAASSEN, ET AL. v. MONSANTO COMPANY, ET AL., C.A. No. 6:17–01210
>
> Eastern District of Missouri
> BADER FARMS, INC., ET AL. v. MONSANTO COMPANY, C.A. No. 1:16–00299
> LANDERS, ET AL. v. MONSANTO COMPANY, C.A. No. 1:17–00020
> SMOKEY ALLEY FARM PARTNERSHIP, ET AL. v. MONSANTO COMPANY, ET AL., C.A. No. 4:17–02031
> COW–MIL FARMS, INC. v. MONSANTO COMPANY, C.A. No. 4:17–02386
>
> Western District of Missouri
> HARRIS v. MONSANTO COMPANY, ET AL., C.A. No. 3:17–05262

A recent opinion in the MDL case denied Monsanto's motion to certify the denial of its motion for summary judgment for interlocutory appeal. 2018 WL 3619509 (July 30, 2018).

There is also litigation on the regulatory front. DTN reports a lawsuit challenging Dicamba's FIFRA registration and compliance with the ESA in the registration process. The story is here.

EPA Agrees to Dicamba Registration and Labeling Changes: The Environmental Protection Agency (EPA) announced an agreement with Monsanto, BASF and DuPont to change

registration and labeling of the dicamba herbicide beginning with the 2018 growing season. The agreement was a voluntary measure taken by the manufacturers to minimize the potential of dicamba drift from “over the top” applications on genetically engineered soybeans and cotton, a recurring problem in the Midwest and South. Changes agreed upon include dicamba products being classified as “restricted use” products for over the top applications, specific training on dicamba use and application, reduction of maximum wind speed for applications from 15 mph to 10 mph, greater restrictions on the times during the day when applications can occur, tank clean-out instructions on the label and label language heightening awareness of application risk to sensitive crops. (from Trends)

Glyphosate

While on the herbicide subject, there has been some attention to Glyphosate. Two entries from the Agricultural Food Law Consortium are worth including:

> **EPA Determines Glyphosate Not Likely Carcinogenic to Humans**
> On December 18, 2017, the U.S. Environmental Protection Agency (EPA) announced the release of a draft human health and ecological risk assessments for the pesticide glyphosate. According to EPA, the draft risk assessment provides a determination that glyphosate is “not likely carcinogenic to humans.” Additionally, EPA asserted that when used according to the pesticide label, glyphosate has not been shown to cause any other “meaningful risks to human health.” EPA stated that in early 2018, the agency “will open a 60-day public comment period for the draft risk assessments, evaluate the comments received, and consider any potential risk management options…”
>
> **EU Renews Glyphosate Approval**
> On November 27, 2017, the European Commission (EC) announced that the European Union (EU) Member States have agreed to renew the approval of the herbicide glyphosate for another 5 years. According to the EC, the agreement was reached by a qualified majority of the Appeal Committee. To achieve a qualified majority, a vote must be supported by 55% of the countries, representing at least 65% of the total EU population. Accordingly, the EC reported that 18 Member States (representing 65.71% of the EU population) voted in favor of renewal, 9 Member States (representing 32.26 % of the EU population) voted against, and 1 Member State (representing 2.02 % of the EU population) abstained.

Litigation in California is also ongoing, regarding Prop 65: ***MONSANTO COMPANY, Plaintiff and Appellant, v. OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT et al.,***, F075362, 2018 WL 1870514 (Cal. Ct. App. April 19, 2018), concerned litigation involving California’s Proposition 65 that seeks to identify chemicals “known to the state to cause cancer.” Issue for court was whether Proposition 65’s reliance on the International Agency for Research on Cancer to identify known carcinogens “violates various provisions and doctrines of the California and United States Constitutions.” Monsanto argued “it is improper for a foreign entity .

. . to determine what chemicals are known to the state to cause cancer." Considering the legislation at issue, the court determined "there is a built-in safeguard that provides adequate protection against potentially arbitrary or abusive determinations that certain chemicals are known to the state to cause cancer." Court ultimately concluded that California "has authority to delegate legislative authority under long-settled principles consistent with republican forms of government." (from Ag & Food Law Blog)

There is also litigation in Wisconsin, primarily geared at marketing. In ***THOMAS BLITZ, Plaintiff, v. MONSANTO COMPANY, Defendant***, 17-cv-473-wmc, 2018 WL 1785499 (W.D. Wis. April 13, 2018), plaintiff alleged statements on defendant's Roundup product label implied the product is safe and induced him to purchase the product and he suffered pecuniary loss. Plaintiff alleged the statement: "Glyphosate targets an enzyme found in plants but not in people or pets," is false and misleading. Defendant argued the statement on the label is not false and that "it is almost universally accepted by regulators and the scientific community . . . that glyphosate targets an enzyme ('EPSP synthase') not found in human or animal cells." Court determined a reasonable consumer "could take this statement to mean that EPSP is not found in people, rather than to mean that EPSP is simply not found in human cells." EPSP is found in people, specifically "in bacteria that inhabit the human and other mammalian guts." Defendant's motion to dismiss granted in part and denied in part. (from Ag & Food Law Blog) . The court also concluded that this claim was not preempted by FIFRA, that a breach-of-express-warranty claim should be dismissed, as well as a claim for unjust enrichment.

In a similar case, ***Beyond Pesticides v. Monsanto Co.***, 311 F. Supp. 3d 82 (D.C. Dist. 2018), the district court recently denied Monsanto's motion to dismiss.

Personal-injury, products-liability cases are emerging. The biggest news is a California state case, ***Johnson v. Monsanto Co.,*** in which a jury returned a verdict of $289.2 million, including $250 million in punitive damages. Information about the case can be found here: https://www.baumhedlundlaw.com/toxic-tort-law/monsanto-roundup-lawsuit/dewayne-johnson-v-monsanto-company/. The California court recently reduced the punitive damages to a little more than $39 million (a one-to-one ratio to compensatory damages). 2018 WL 5246323 (October 22, 2018).

Another product-liability case is ***In re Roundup Products Liability Litigation,*** 2018 WL 3368534 (N.D. Cal., July 10, 2018). There, the court recently denied Monsanto's motion for summary judgment, concluding that the plaintiffs' expert testimony was admissible under *Daubert* and, as a result, there was sufficient evidence to proceed to trial on the question whether Roundup causes Non-Hodgkin's Lymphoma at human-relevant doses.

Farm Programs

Wetlands Reserve Program

Netterville v. Commonwealth Land Title Insurance Co., 2017 WL 6540501 (W.D. Louisiana Oct. 11, 2017), *Magistrate Report and Recommendation adopted by Court*, 2017 WL 6540035 (Dec. 20, 2017), is a case involving a challenge to the government's acquisition of property under the Wetlands Reserve Program. The plaintiff in this case attempted to challenge the conveyance of an easement by Warranty Easement Deed that was executed by her father in 1997. The plaintiff contended that her father was not the rightful owner at the time of conveyance. Rather, a portion of the property was held in trust at the time of the conveyance, and the plaintiff was the sole beneficiary of the trust. Upon her father's death, the plaintiff became the owner and she learned of the conveyance in 2014. The court concluded that the claim was barred under the Quiet Title Act, 28 U.S.C. 2409a because the plaintiff failed to file within the 12 year limitations period. The statute bars claims made by outside of the limitations period when the claimant or her predecessor in interest knew or should have known of the claim against the U.S. In this case, the court concluded that the father was a predecessor in interest, despite the involvement of two trusts, one of which apparently had concurrent ownership with the father. It does not appear from the opinion that the father owned the land subject to the easement in fee at the time of the conveyance. Rather, at best, before the conveyance he had concurrent ownership with a trust that, ultimately, would convey the underlying fee to the plaintiff. And, at the time of the conveyance, was himself an income beneficiary of the trust. Nonetheless, the court concluded that the father's knowledge of the claim that could have been made against the government started the limitations clock.

Netterville filed their action against numerous defendants. The title companies dropped out of the litigation on Netterville's own motions. The only remaining defendant was the purported agent who settled the transaction, Coleman. Coleman filed for summary judgement, contending another lawyer named Henderson (her husband) was the settlement agent. The court agreed and granted the motion. 2018 WL 1462107 (Mar. 23, 2018).

In ***H&R Property service, LLC v. Conine***, 2018 Ill. App. (4th) 170602-U (March 14, 2018) (unpublished), the court was faced with a claim about the impact of a WRP conveyance on a prescriptive easement that had been acquired for use of the property that was subject to the WRP easement. The plaintiff owned the land that was subject to the prescriptive easement and claimed that the defendant had lost or abandoned the prescriptive easement because she had conveyed the WRP easement, changing the use of the property from farming to non-farming and abandoning the easement that was created for farming purposes. The court rejected both claims, relying on Illinois law.

Conservation Reserve Program

In ***Welty v. US,*** 135 Fed. Cl. 538 (2017), the court was faced with a claim that the USDA and NRCS had taken the property of a neighboring landowner when a CRP participant constructed a levee pursuant to a conservation plan on the CRP participant's property. The court wrangled with statute of limitations arguments, concluding the suit was timely. But the court concluded no

takings claim could be made against the USDA because of the voluntary contractual nature of the relationship between the program participant and the government.

Swampbuster & 404 Interaction

In ***Orchard Hill Building Co. v. USACOE***, 2017 WL 4150728 (N.D. Ill. Sept. 19, 2017), the district court addressed an argument that the 404 program did not apply to prior converted cropland that was slated for use as part of a residential development. The court concluded that while the regulations excluded PC from the definition of WOTUS, they allowed PC to be abandoned and regain their protected status after a 5 year period. Of course, under the farm program, PC is always PC. However, for purposes of the CWA and 404, PC can become WOTUS, if the PC status is abandoned. In addition, even though part of the area under consideration was an artificial wetland, it could still qualify as WOTUS, even though it is excluded from Swampbuster coverage.

On appeal, the 7th Circuit reversed, but not on the PC or the artificial wetland decisions. Rather, the 7th Circuit concluded that the Corps failed to establish a significant nexus between the subject wetlands and navigable-in-fact waters. 893 F.3d 1017 (7th Cir. 2018).

Farm Bill

Going into Conference, the farm bill negotiators faced significant differences in their respective chamber's conservation titles. An explanation can be found here: https://www.agri-pulse.com/articles/11205-farm-bill-negotiators-face-sharp-differences-on-conservation. The House wanted to, among other things, eliminate the CSP and increase the CRP by 20%. The Senate would increase the CRP much less and retain the CSP. Many other differences remain.

CWA

WOTUS

The story is a somewhat long one, and it can be found here:
https://www.calt.iastate.edu/blogpost/whats-wotus

A map of the states operating under the 2015 rule and the pre-2015 rule can be found here: https://www.epa.gov/wotus-rule/definition-waters-united-states-rule-status-and-litigation-update

In ***National Association of Manufacturers v. Department of Defense***, 138 S.Ct. 617 (2018), the court concluded that the challenge to the WOTUS rule had to be brought in the federal district courts. The CWA did not provide for judicial review directly in the federal courts of appeals under 33 U.S.C. 1369(b)(1). As a result, the nationwide stay on the use of the rule that came out of the Sixth Circuit also fell by the wayside. However, the agencies stepped in with a

new rulemaking that provided an effective date to the 2015 WOTUS rule of February 6, 2020. So, for a while, the Corps and the EPA operated without the 2015 WOTUS rule, effectively without any rulemaking since the 1970s. The court in ***South Carolina Coastal Conservation League v. EPA***, 2018 WL 3933811 (D. S.C. 2018), struck down the extension rule and issued a nationwide injunction. So the 2015 rule was back in play in all of the states where no federal district court had enjoined its use. That is where we stand today, with district courts in North Dakota (127 F. Supp. 3d 1047 (D. N.D. 2015), Georgia (326 F. Supp. 3d 1356 (S.D. Ga. 2018)), and Texas (2018 WL 4518230 (S.D. Tex. 2018)) issuing injunctions against the 2015 rule. Twenty two states remain subject to the 2015 rule, as well as the District of Columbia and the US Territories.

Bloomberg BNA has also reported that "EPA Administrator Scott Pruitt is now in charge of making decisions on water pollution permits, a job formerly left to the agency's regional chiefs." 49 Environment Reporter 509 (4/6/2018). The memo referenced in the article is available here, as well as the revised delegation of authority. The change appears geared at controversial jurisdictional determinations.

Litigation applying WOTUS standards continues. ***UNITED STATES of America, Plaintiff–Appellee, v. Joseph David ROBERTSON, Defendant–Appellant***, No. 16-30178, 2017 WL 5662532 (9th Cir. November 27, 2017) involved alleged violations of the Clean Water Act (CWA) after defendant constructed some ponds on National Forest System Lands and discharged dredged and fill material into surrounding wetlands. Defendant did not get permits to build the ponds or to "discharge dredged material into waters of the United States." He was found guilty of CWA violations and appealed. Appellate court, citing Justice Kennedy, observed that "only wetlands with a *significant nexus* to a navigable-in-fact waterway are covered by the Act." Defendant countered that "a 'significant nexus' exists only when a wetland would be polluting an otherwise clean water." Appellate court disagreed, however, and stated that, "Whether a wetland or non-navigable water has a significant nexus to a traditionally navigable water has nothing to do with whether the traditionally navigable water is healthy." Court found no abuse of discretion by district court and affirmed. (from Ag & Food Law Blog)

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Foster v. United States EPA**,** Civil Action No. 14-16744, 2017 WL 3485049 (S.D. Va. Aug. 14, 2017). (From Trends): In a case challenging an EPA Administrative Compliance Order (ACO) to restore four streams that had been filled by a land developer under the Administrative Procedure Act (APA), the U.S. District Court for the Southern District of Virginia found for the plaintiff developer with respect to three of the streams but upheld EPA's order as supported by the record with respect to the fourth stream. The court upheld the EPA's order with respect to one of the four streams because there was sufficient evidence of record that the stream had a "relatively permanent flow" before it was filled. The court also found that the administrative record was almost devoid of evidence pertaining to the significant nexus of the other three streams with navigable waters. EPA had only provided very general information on the

importance of headwaters to the integrity of downstream navigable waters. The court was also concerned that EPA did not follow required analytic protocols in making its significant nexus determination. Accordingly, the ACO was found to be arbitrary and capricious with respect to the three smaller streams because the administrative record did not support the EPA's determination.

***Florida is trying to become the third state to administer the 404 program*.** It is currently mired in the details of how to do ESA consultation. 49 Environment Reporter 515 (4/6/2018).

In Wisconsin, state lawmakers passed, and the governor signed two bills limiting the reach of state protections of waterways and wetlands. AB 599 and AB547. 49 Environment Reporter 470 (3/30/2018)
https://news.bloombergenvironment.com/environment-and-energy/wis-governor-signs-streams-wetlands-bills-over-critics-objection/

Point Sources

In ***OLYMPIC FOREST COALITION, a Washington corporation, Plaintiff–Appellee, v. COAST SEAFOODS COMPANY, a Washington corporation, Defendant–Appellant***, No. 16-35957, 2018 WL 1220506 (9th Cir. March 9, 2018), environmental groups filed a citizen suit under the Clean Water Act (CWA) claiming owner of an oyster hatchery discharged pollution into an adjacent bay "through pipes and ditches, and channels." Plaintiffs argued such discharge required a National Pollution Discharge Elimination System (NPDES) permit. Lower court denied defendant's motion to dismiss for failure to state claim and he appealed. Appellate court held that "pipe, ditches, and channels discharging pollutants from non-concentrated aquatic animal production facilities are point sources requiring NPDES permit." (From Ag & Food Law Blog)

Citizen Suits

There have been a significant number of reports related to citizen suits, all of the following are from the Ag & Food Law Blog:

In ***GRANT TRESSLER, Plaintiff, v. SUMMIT TOWNSHIP and the COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, Defendants***, No. 3:17-cv-32, 2018 WL 948773 (W.D. Pa. February 16, 2018), a property owner sued under the Clean Water Act and the Pennsylvania Clean Streams Law. Plaintiff alleged defendant damaged his property and the waters of the United States "by maintaining a 'ditch-and-culvert system' that discharges storm water and untreated sewage onto his property and into a river bordering his property." Defendant filed motion to dismiss and argued plaintiff's claims "are barred by Eleventh Amendment sovereign immunity because [defendant] is an arm of the Commonwealth of Pennsylvania." Court observed plaintiff could not invoke an exception to sovereign immunity because "citizen suits filed pursuant to the provisions of the Clean Water Act do not abrogate a

state's **Eleventh Amendment immunity**." Court concluded plaintiff failed to state a claim and dismissed the action.

In ***CALIFORNIA ENVIRONMENTAL PROTECTION ASSOCIATION, Plaintiff, v. SONOMA SOIL BUILDERS, LLC, et al., Defendants***, No. 15-cv-04880-KAW, 2018 WL 1242252 (N.D. Cal. March 9, 2018), plaintiff filed citizen suit under the Clean Water Act (CWA) and sought to add two new defendants to the proceedings. Proposed new defendant (SoCo) had ceased operations at the location at issue and argued adding them to the complaint "would be futile because a citizen suit cannot be brought where the polluting activity has already ceased." Court observed that citizens "may seek civil penalties only in a suit brought to enjoin or otherwise abate an *ongoing* violation." Here, the court concluded that "a case brought against SoCo at this juncture would be based solely on past violations, and . . . '**private plaintiffs … may not sue to assess penalties for wholly past violations.**'" Plaintiff's request denied.

In ***David BENHAM, Plaintiff–Appellee, v. OZARK MATERIALS RIVER ROCK, LLC, Defendant–Appellant***, No. 17-5069, 2018 WL 1414897 (10th Cir. March 22, 2018), plaintiff filed citizen suit against a mining company for violation of Clean Water Act (CWA) based on the company's "discharge, without permit, of dredge or fill material into navigable waters that disturbed more than one-half acre of wetland." Lower court found that company violated CWA and approved citizen's proposed restoration plan and Company appealed. Company argued plaintiff cannot bring a citizen suit "because the Army Corps of Engineers is primarily responsible for the enforcement of the CWA." Appellate court concluded because the Corps "was not diligently prosecuting an enforcement action . . . [plaintiff] was entitled to bring his citizen suit." Affirmed.

In addition to those reported suits, BNA reports that ***Environment America, Inc. v. Pilgrim's Pride Corp.***, Case No: 3:17-cv-272-32JRK (Nov. 15, 2017), will settle. This case was a citizen suit against Pilgrim's Pride's poultry processing facility in Live Oak, Florida, for violating its NPDES permit. Pilgrim's Pride will pay $1.3 million to Stetson University and paying an additional $130,000 in civil penalties. Stetson is to use the funds to create The Sustainable Farming Fund, within the Institute for Water and Environmental Resilience. The Fund is to provide grant money to farmers to get better water quality outcomes.

Discharges and Groundwater (statutory text)

A significant number of cases are hitting on the direct v. indirect discharge notion of CWA liability. A good place to start, is the Fourth Circuit in ***Upstate Forever v. Kinder Morgan Energy Partners***, 887 F.3d 637 (4th Cir. 2018). In that case, plaintiffs sued the owner of a gasoline pipeline that had ruptured and discharged a large amount of gasoline to soils and groundwater that continues to seep into navigable waters, approximately 1000 feet or less from the pipeline. The concluded that an indirect discharge like this was a viable theory upon which to base a CWA violation. The connection between the groundwater and the navigable waters need to be "clear" and "direct" to support such a claim.

Other courts have recently agreed. Most notably and recently was the 9th Circuit in ***Hawai'i Wildlife Fund v. County of Maui***, 886 F.3d 737 (9th Cir. 2018), which involved injection wells that discharged pollutants below the surface and which migrated to navigable waters. The connection in that case was supported by tracer dye studies. The court left "for another day the task of determining when, if ever, the connection between a point source and a navigable water is too tenuous to support liability under the CWA." But it did mention that the discharge must be "fairly traceable" to the point source from the navigable waters.

Disagreement can be found in a dissent in *Upstate Forever*, and in ***Kentucky Waterways Alliance v. Kentucky Utilities Co.***, 2018 WL 4559315 (6th Cir. 9/24/18), where the court concluded that the coal-ash ponds' contributions of pollutants through groundwater were not discharges. The court opted for a requirement that discharges be direct in order to qualify under the statutory language. However, the court also concluded that RCRA applied to the contributions of pollutants to the environment.

The court in ***Kentucky Waterways*** quoted at length from a 4th Circuit case, ***Sierra Club v. Va. Electric & Power Co.***, 2018 WL 4343513 (4th Cir. 9/12/2018), reaching a similar conclusion. Notably, however, the opinion in ***Sierra Club*** agreed with ***Upstate Forever***, concluding that the contribution of pollutants to waters of the United States through groundwater with a "direct hydrologic connection" was sufficient for CWA liability. However, ***Sierra Club*** concluded the coal ash piles and settling ponds on the the property were not point sources, within the meaning of the CWA. See also ***Toxics Action Center v. Casella Waste Systems***, 2018 WL 4696750 (D. Mass. 9/30/2018) (concluding a landfill is not a point source). The court in ***Tennessee Clean Water Network v. Tennessee Valley Authority*****,** 905 F.3d 436 (6th Cir. 9/24/2018), followed the logic of ***Kentucky Waterways***, basing its decision on the groundwater connection, concluding it was not sufficient for CWA purposes.

The matter will likely be heard by the U.S. Supreme Court. The loser in ***Maui County*** has petitioned for cert. One should not forget that this issue has been around for a long time. I've had ***Umatilla Water Quality Protective Association, Inc. v. Smith Frozen Foods, Inc.***, 962 F. Supp. 1312 (D. Or. 1997) (addressing brine ponds), in a set of course materials for some time. It collects cases on both sides of the issue, dating to 1975.

It should be noted that the question of indirect discharge via groundwater does not require one to expand the definition of WOTUS. These cases presume that WOTUS does not include groundwater. Even if that is the case, however, there remains the question of what it means to discharge pollutants, i.e. "add[] . . . any pollutant to navigable waters from any point source". The question is not whether the groundwater is a "navigable water." Nor is the question whether the groundwater is a "point source". The question is whether the pollutant's addition to the navigable water from the point source must occur independently of groundwater. Stated differently, the question is whether groundwater's involvement in the addition of pollutants to navigable what from the point source cuts off the duty to get a permit.

As a regulatory matter, the EPA recently requested comments on the question. This comment period ended on May 21, 2018, and can be accessed here. In that request, the EPA lists their prior comments on the hydrologic connection required to reach discharges that involve groundwater. A particularly interesting one to agricultural interests is the 2001 proposed CAFO rule. Proposed NPDES Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 66 FR 2,960, 3,017 (Jan. 12, 2001).

Impaired Waters

Ohio has had quite a time of figuring out Lake Erie is impaired or not. BNA reports on recent developments here, and the Center and Peggy provide a recent update here.

In ***Environmental Law and Policy Center, et al., Plaintiffs, v. United States Environmental Protection Agency, et al. Defendants***, No. 3:17CV01514, 2018 WL 1740146 (N.D. Ohio April 11, 2018), plaintiffs challenged EPA's approval of Ohio's 2016 "impaired waters list" under the Administrative Procedure Act (APA), arguing the Ohio EPA and the U.S. EPA failed to perform duties under the Clean Water Act (CWA). Ohio EPA declared water from Lake Erie as "impaired for 'public drinking water supply,'" due to presence of phosphorus runoff from fertilizer and farmland manure. Court observed that [a]lthough the CWA requires the U.S. EPA to approve or disapprove a state's § 303(d) list within thirty days. . . the U.S. EPA, in response to Ohio's 2016 impaired waters list, did neither." Court noted, however, there was no "final action" for the EPA to review and concluded plaintiffs "cannot sue the U.S. EPA for failing to discharge a nondiscretionary duty without first giving sixty days' notice of the alleged violation to 'the [EPA] Administrator.'" Remanded to EPA for further proceedings. (from Ag & Food Law Blog)

Nutrient Criteria

EPA has proposed establishing federal nutrient criteria for the state of Missouri's lakes and reservoirs. 82 Fed. Register 61213 (12/27/17) (from ELI)

Water Transfers

SCOTUS denied cert in ***Riverkeeper v. EPA***, No. 17-446, which was asking the court to review 846 F.3d 492 (2d Cir. 2017), which upheld the water transfer rule that exempted transfers from the NPDES program.

Trump Infrastructure Plan

This plan would change the CWA considerably, extending NPDES permits from 5 to 15 years and relaxing 404 permitting and giving jurisdictional determinations over to the Corps, rather than the EPA. EPA would lose its veto authority on dredge and fill operations.

TMDL

Ohio Valley Envtl. Coalition (OVEC) v. Pruitt, 893 F.3d 225 (4th Cir. 2018).
The U.S. Circuit Court of Appeals for the Fourth Circuit reversed summary judgment based on allegations that EPA failed to perform a nondiscretionary duty to promulgate total maximum daily loads (TMDLs) for biologically impaired waters in West Virginia. Pursuant to the Clean Water Act, each state must develop TMDLS for impaired waters that it places on the "303(d) list" of impaired waters. A state must submit TMDLs to EPA "from time to time," and according to the impaired water body's "priority ranking." Once a state submits a TMDL, EPA must approve or disapprove the state's TMDL within 30 days and, if disapproved, EPA must develop and finalize its own TMDL 30 days after a disapproval. In 2012, West Virginia enacted a state law to delay the development of TMDLs for biologically impaired waters. In 2014, responding to pressure from plaintiffs and EPA, West Virginia projected specific dates for developing ionic toxicity TMDLs from 2020 to 2025 for the 573 waters at issue. Based on the state's delay, plaintiffs brought suit, claiming EPA's duty was triggered due to West Virginia's "constructive submission" of no TMDLs. Relying on significant precedent from other circuits, the court held that the constructive submission doctrine was inapplicable here because the doctrine only applies when a state "clearly and unambiguously" expresses a decision not to submit TMDLs and has no plan to remedy the situation. As of now, West Virginia is still within the 8–13 years set out in EPA guidance to develop TMDLs, is making a good-faith effort to comply with its state law and has submitted a "credible plan" with EPA to produce those TMDLs. (from *Trends*)

Natural Res. Def. Council v. E.P.A., No. 16-1861 (JDB), 2018 WL 1568882 (D.D.C. Mar. 30, 2018). Pursuant to the CWA, Maryland and the District of Columbia jointly developed a "total maximum daily load" for the Anacostia River that expressed a quantity of trash that must be removed from the river per year rather than how much could be added to the waterbody to comply with state water quality standards. The D.C. Circuit held the states' joint plan failed to set a "maximum load" within the plain meaning of the statutory phrase and ordered a replacement plan.

State Water Quality Headlines

Iowa has put money to the question of nitrate contamination.
Our Water, Our Land Series

Minnesota farmers are leery of a new nitrate rule.
Minnesota Rules

Tennessee is exempting all but very large CAFOs from permitting requirements

First Amendment

W. Watersheds Project v. Michael**,** 869 F.3d 1189 (10th Cir. 2017) (from *Trends*): In a case challenging the constitutionality of two Wyoming statutes, the Tenth Circuit reversed the U.S. District Court for the District of Wyoming's ruling that environmental nongovernmental organization trespassers who cross private lands to gather natural resources data may not invoke First Amendment free speech protections in challenging the statutes. The statutes in question impose criminal and civil liability on individuals who cross "private land to access adjacent or proximate land" to collect resources data. The court observed that "[a]lthough trespassing does not enjoy First Amendment protection, the statutes at issue target the 'creation' of speech by imposing heightened penalties on those who collect resource data [by trespassing]." The court specifically noted that the statutes bar the plaintiffs from engaging in protected speech that would otherwise be permissible on public property and that "the effect of the challenged provisions is to increase a pre-existing penalty for trespassing if an individual subsequently collects resource data from public land." The court reversed and remanded the case to the federal district court with directions to identify the level of scrutiny to be applied in determining whether the statutes are constitutional.

From Ag & Food Law Blog: In ***RESOLUTE FOREST PRODUCTS, INC., ET AL., Plaintiffs, v. GREENPEACE INTERNATIONAL, ET AL., Defendants***, No. 17-cv-02824-JST, 2017 WL 4618676 (N.D. Cal. October 16, 2017), plaintiff alleged defendant targeted its forestry company with media campaigns "designed to reduce [plaintiff's] profits through false or misleading statements about the company's impacts on the environment and on indigenous communities." Defendants moved to dismiss arguing that their conduct "consists of speech and other advocacy that is protected by the First Amendment." Court concluded plaintiff is a "limited public figure for the purposes of the claims involved in this case," and reasoned that "the company must show that the Defendants' speech and related actions were made with actual malice." Court considered California's anti-SLAPP (Strategic Lawsuits Against Public Participation) statute and concluded defendants' actions were "issues of *public interest* for the purposes of California's anti-SLAPP statute." Defendants' motion to dismiss granted.

CERCLA Reporting (clickable heading)

Congress passed the Fair Agricultural Reporting Method (FARM) Act as part of an omnibus bill, amending CERCLA and EPCRA to exclude animal operations. An explanation can be found here: https://www.epa.gov/epcra/cercla-and-epcra-reporting-requirements-air-releases-hazardous-substances-animal-waste-farms.

In ***Don't Waste Arizona Incorporated, Plaintiff, v. Hickman's Egg Ranch Incorporated, Defendant***, No. CV-16-03319-PHX-GMS, 2018 WL 1318874 (D. Ariz. March 14, 2018), plaintiff sued defendant (egg ranch) for failure to "report ammonia emissions in violation of the Emergency Planning and Community Right-to-Know Act (**EPCRA**)." Defendant maintained the reporting obligation "does not apply to any release which results in exposure to persons solely within the site or sites on which the facility is located." Issue for court was whether the ammonia

produced results in exposure to persons "solely within the site or sites on which the facility is located." Court observed that the release of ammonia "must elicit the need to either inform the public about the presence of hazardous and toxic chemicals, or provide for [an] emergency response." Defendant provided evidence of air sampling showing no ammonia emissions and court denied plaintiff's motion for partial summary judgment. (From Ag & Food Law Blog). See also **2018 WL 4599730** (concluding the FARM Act did not apply retroactively., EPA currently interprets the EPCRA to exclude "routine agricultural operations."

CERCLA cost recovery, third-party defense: *Diamond X Ranch, LLC v. Atlantic Richfield Co.*, 2017 WL 4349223 (D. Nev. Sep. 29, 2017). (from Trends) On cross-motions for summary judgment in a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) cost recovery action, the U.S. District Court for the District of Nevada held that plaintiff Diamond X Ranch LLC could not recover for its past costs of investigation incurred after February 2012 because they were duplicative of EPA's investigative efforts and therefore not "necessary." The court also found that the plaintiff's lessee was a former operator of the site by virtue of its irrigation practices and spreading of sediments, which exacerbated contamination of the plaintiff's property. The defendant's motion for summary judgment as to other past costs claimed was denied due to the existence of disputed issues of fact. The court additionally found that neither the plaintiff nor its lessee was eligible to assert a CERCLA third-party defense because of their conduct in irrigating the property and disposing of sediments. Finally, the court also ruled that defendant Atlantic Richfield's motion for summary judgment, which contended that Atlantic Richfield was not liable for future costs of response, was premature.

***Next Millennium Realty, LLC v. Adchem Corp*., 690 Fed. App'x 710 [not for publication] (2d. Cir. 2017), *petition for cert. filed* (Sept. 28, 2017). (from Trends)** The Second Circuit affirmed the district court's dismissal of CERCLA contribution and cost recovery claims against sublessor defendants with respect to a site operated as a textile manufacturing facility. Relying on Second Circuit precedent rejecting potential CERCLA owner liability for lessees and sublessors based upon their *de facto* ownership or site control, the court reasoned that if mere site control were enough to trigger liability, owner liability would balloon under CERCLA and operator liability would become practically meaningless. The court held that a sublessor/lessee should be considered liable only if it truly "stands in the shoes of an owner," and that "site control alone is an improper basis for the imposition of owner liability." The court also affirmed the district court's dismissal of claims against a certain defendant on a single enterprise theory due to certain lessor defendants having subleased the site to another defendant business entity that they owned. The court noted that management control alone is not enough to pierce the corporate veil and impose CERCLA liability under New York state law.

Cal. Dep't of Toxic Substances Control v. Westside Delivery, LLC, 888 F.3d 1085 (9th Cir. 2018). The Ninth Circuit reversed the district court's grant of summary judgment, holding defendant's liability for contamination was not barred by an "innocent-buyer" defense. Although the statute protects from liability government entities and "innocent" persons who purchased

land without actual or constructive knowledge of the contamination, a buyer of tax-defaulted property "should be more wary of preexisting contamination than a typical land purchaser."

Clean Air Act

***Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017)**. (from Trends) The D.C. Circuit vacated EPA's administrative stay of portions of the methane regulations in the New Source Performance Standards (NSPS) for the Oil and Natural Gas Sector. EPA sought to stay further judicial review and issued a temporary stay of the prior rule pending the agency's reconsideration of those methane regulations. The court held, however, that EPA failed to comply with the requirements for reconsideration and stay contained in Clean Air Act § 307(d)(7)(B) and therefore that the agency's action was invalid. The majority opinion concluded that EPA's authority to stay the rule was expressly linked to the statutory requirements for administrative reconsideration set forth in § 307(d)(7)(B). EPA claimed broad discretion to reconsider its own rules, but the court disagreed, stating that EPA could not ignore or fail to enforce its own rules. Also, when EPA issued the stay, it relied upon § 307(d)(7)(B), and not a broader inherent authority. A subsequent petition for rehearing *en banc* was denied.

SINCLAIR WYOMING REFINING COMPANY; Sinclair Casper Refining Company, Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent. No. 16-9532, 2017 WL 4876177 (10th Cir. October 30, 2017) (from the Ag and Food Law Blog) concerned an amendment to the Clean Air Act (CAA), wherein Congress directed the EPA "to operate a Renewable Fuel Standards Program (the RFS Program) to increase oil refineries' use of renewable fuels." Statute at issue required the EPA to grant exemptions on a "case-by-case basis." Court concluded that the EPA "exceeded its statutory authority under the CAA in interpreting the hardship exemption to require a threat to a refinery's survival as an ongoing operation." EPA's decisions vacated and remand to the agency.
In **Natural Resources Defense Council v. EPA**, D.C. Cir. No. 16-1413, EPA counsel encouraged the panel to judicially define the distinction between natural (excludable from attainment determinations) and anthropogenic sources.

ESA

Cert has been granted in **Weyerhaeuser Co. v. USFWS**, which was known as **Markle Interests, LLC v. USFWS**, 827 F.3d 452 (5th Cir. 2016), below. The case questions the designation of unoccupied habitat as critical habitat. The 5th Circuit concluded that designation of critical habitat was proper.

RCRA

In ***UNITED STATES of America, Plaintiff–Appellee, v. Max SPATIG, aka John Spatig, aka John Serge Spatig, Defendant–Appellant***, No. 15–30322, 870 F.3d 1079 (9th Cir. September 13, 2017), defendant was convicted of storing over 3,000 containers of hazardous waste in his

yard without a permit, in violation of the Resource Conservation and Recovery Act (RCRA). Defendant appealed, challenging court's refusal to admit evidence of his diminished capacity. Defendant maintained his crime was of specific, not general, intent. Appellate court held that the "RCRA provision defendant violated was a general-intent crime, and thus he could not advance a diminished-capacity defense." Conviction affirmed. (From Food & Ag Lab Blog)

Rivers

DOUBLE R. RANCH TRUST et al., Plaintiffs, v. MICHAEL D. NEDD1 et al., Defendants, No. 17-cv-438 (CRC), 2018 WL 466652 (D.D.C. January 18, 2018) concerned a Bureau of Land Management (BLM) decision that a segment of the Rogue River in Oregon "is suitable for Congress to designate for future protection under the Wild and Scenic Rivers Act." Under the Act, Congress designates certain rivers for statutory protection "intended to preserve the river's flow, water quality, and other natural, recreational, or cultural attributes." Plaintiffs argued with the decision and sought its reversal. Court found plaintiffs lacked standing to sue because BLM's suitability determination "is but one step in a long and unpredictable process towards potential congressional designation, and because [plaintiffs] fail to allege an injury-in-fact." Motion to dismiss granted. (from Ag & Food Law Blog)

Rivers as Plaintiffs: Thought about it for a little while.

NEPA & Grazing

In ***COLORADO PRAIRIE INITIATIVE, a Colorado nonprofit corporation, Petitioner, v. MARTY LOWNEY, in his official capacity as the Colorado State Director for USA-APHIS Wildlife Services, JASON SUCKOW, in his official capacity as the Western Regional Director for USA- APHIS Wildlife Service, and ANIMAL AND PLANT HEALTH INSPECTION SERVICE – WILDLIFE SERVICES, a federal agency of the United States Department of Agriculture, Respondents***, No. 17-cv-00321-CMA, 2018 WL 1566831 (D. Colo. March 30, 2018)***,*** plaintiffs, advocates for the conservation of "prairie ecosystems," challenged APHIS's prairie dog removal and control operations in Colorado, alleging the agency violated the National Environmental Policy Act (NEPA). APHIS argued its activities "were categorically excluded from the procedural requirements in NEPA." Court observed APHIS's own regulation holds "that the Agency can categorically exclude those actions which are 'routine measures,' such as routine wildlife 'removals' and 'control.'" Court found APHIS complied with NEPA regulations and affirmed the agency's action. (from Ag & Food Law Blog).

In ***JARITA MESA LIVESTOCK GRAZING ASSOCIATION et. al v. UNITED STATES FOREST SERVICE and DIANA TRUJILLO, in her official and individual capacities, Defendants***, No. CIV 12-0069 JB/KBM, 2017 WL 4621600 (D.N.M. October 13, 2017), the Forest Service (FS) intended to reduce some grazing permits and issue was whether the National Environmental Policy Act (NEPA) requires the FS to consider the "social and economic impacts of a proposed action" before implementing it. Here, FS decided to reduce grazing permits for the Alamosa and

Jarita Mesa Grazing Districts before considering an Environmental Assessment. Court found that NEPA requires agencies to consider the "environmental impacts of agency action." However, the court noted that NEPA does not require agencies to "consider social and economic impacts that flow directly from an action and not from the action's effect on the physical environment." Court concluded that "[b]ecause the Plaintiffs allege that the Defendants failed to consider an agency action's direct social and economic impacts . . . the Plaintiffs' allegations do not amount to a NEPA violation." (from Ag & Food Law Blog).

In ***WESTERN WATERSHEDS PROJECT and Wildearth Guardians, Plaintiffs, v. U.S. FOREST SERVICE, Defendant***, No. 1:17-CV-434-CWD, 2017 WL 5571574 (D. Idaho November 20, 2017), plaintiff filed motion to "enjoin grazing of domestic sheep on [allotments] in the . . . National Forest." Plaintiffs argued the sheep pose a "grave risk to the nearby South Beaverhead bighorn sheep population," and that authorizing the grazing is "inconsistent with the direction set forth in the 1997 Revised Forest Plan . . . and thus is also a violation of NFMA." FS argued it is in compliance with the Forest Plan "because it has acted to limit domestic sheep grazing within the Forest and within the allotments at issue." Motion for preliminary injunction granted after court determined that "there is a likelihood of irreparable harm if the grazing proceeds, that the balance of harm clearly tips in favor of the Plaintiffs, and that an injunction is in the public interest." (from Ag & Food Law Blog).

Indigenous Environmental Network v. U.S. Dept. of State**,** Case No. 4:17-cv-0031-BMM (D. Mont. August 2018). A district court ordered the State Department to supplement its 2014 EIS for a cross-border oil pipeline, known as Keystone XL, to consider the pipeline company's alternative route that was approved for the project.

Alliance for the Wild Rockies v. U.S. Forest Service**,** Case No. 16-35829 (9th Cir. August 2018). The Ninth Circuit affirmed in part and reversed in part a district court's summary judgment in favor of the U.S. Forest Service's approval of a site-specific project concerning restoration activities on roughly 80,000 acres in Payette National Forest in Idaho. Environmental groups argued the project's approval arbitrarily and capriciously deviated from a forest-wide management plan, and the court agreed, concluding the site-specific project's redesignation of land deviated from the standards, guidelines, and desired conditions set forth in the forest-wide plan.

SDWA

In a case that has grabbed national headlines, residents who lived through the 2014 Flint Water Crisis were allowed to proceed with their claims of constitutional violations, which the Sixth Circuit determined were not preempted by the SDWA: ***Boler v. Earley*****,** 865 F.3d 391 (6th Cir. 2017), *cert. denied*, Nos. 17-666; 17-901; 17-989 (2018). The U.S. Supreme Court declined to review a Sixth Circuit ruling that allowed three cases by Flint, Michigan, residents to proceed with constitutional claims under 42 U.S.C. § 1983 against state and local officials. The Sixth Circuit did not address the merits of plaintiffs' claims for violation of the Contract, Due Process,

and Equal Protection Clauses, but issued limited holdings that § 1983 was not preempted by the Safe Drinking Water Act and Michigan's Governor Snyder was protected by the sovereign immunity doctrine.

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