

AAALA 2020 Symposium

ESG: Legal Perspectives on Responsible Farmland Ownership and Operations

Content

Increasing pressure across agricultural value chain for performance in environmental and societal outcomes

- There is a growing public awareness and concern for alleged adverse impacts from agriculture (especially 'big ag') that has the potential to drive more reputational, policy, and regulatory risks.
 - *The Great Land Robbery* (September 2019, The Atlantic) <https://www.theatlantic.com/magazine/archive/2019/09/this-land-was-our-land/594742/>
 - *How Big Ag is Preventing is Preventing Farmers from Combating the Climate Crisis* (September 2019, Rolling Stone) <https://www.rollingstone.com/politics/politics-features/big-agriculture-preventing-farmers-combating-climate-crisis-886538/>
 - *Water and Power: A California Heist* (2017, National Geographic) <https://www.nytimes.com/2017/03/02/movies/water-power-a-california-heist-review.html>
- Food and ag brands are increasingly demanding sustainable sourcing, which creates market access risk for growers. For example:
 - Cargill's Corn Commitment: "As a leading purchaser, processor and transporter of corn, Cargill is committed to sourcing sustainably-produced corn in major supply chains worldwide."
 - Nestle's Sustainable Sourcing Guidelines: "As a leading food and beverage manufacturer, we have established a robust set of guidelines on responsible sourcing and are continually working to make our supply chain more transparent."
 - General Mill's Sustainable Sourcing Goal: "Our goal is to sustainably source 100% of our top 10 priority ingredients by 2020."
 - PepsiCo Global Sustainable Agriculture Policy: "As a leading food and beverage company, agriculture is central to our supply chain... As we continue our journey in Sustainable Agriculture, PepsiCo's agriculture decisions and actions are based on the following principles."
- Increasing allocation of capital to ESG (environmental, social, governance)-aligned funds shifting considerations for access to capital.
 - Assets under management by UN PRI (Principles for Responsible Investment) signatories had a compound annual growth rate of 22% since 2006 and today represent over \$103 trillion dollars. <https://www.unpri.org/pri/about-the-pri>

Public, corporate, and investor pressure for ESG outcomes is creating new legal considerations and opportunities

- Issues area focus
 - Water
 - *County of Maui v. Hawai'i Wildlife Fund and Loyal Pig, LLC v. Department of Ecology*
 - <http://www.klgates.com/muddied-groundwater-new-supreme-court-test-adds-confusion-and-uncertainty-to-clean-water-act-permitting-jurisdiction-04-28-2020/>
 - <http://www.klgates.com/risk-of-relinquishment-increases-with-decision-in-loyal-pig-llc-v-department-of-ecology-05-15-2020/>
 - Climate
 - Growing Climate Solutions Act of 2020
 - <https://www.whitehouse.senate.gov/news/release/growing-climate-solutions-act-set-to-be-introduced-in-us-senate>
 - https://www.braun.senate.gov/sites/default/files/2020-06/Growing%20Climate%20Solutions%20Act%20One%20Pager_0.pdf
 - Global Ethical Supply Chains and labor issues
- Tenant / landowner relationships
- Certification and assurance programs
 - Sustainability Accounting Standards Board (SASB) - guidelines that help global businesses identify, manage, and report on sustainability practices.

Agriculture is following a precedent set by the timber sector for sustainability certification and assurance programs

- Like agriculture, social and environmental issues led to response from timber sector (Timber Wars and spotted owl controversy)
 - <https://archive.seattletimes.com/archive/?date=20000806&slug=4035697>
- In the 1990s two certification programs launched to address a lack of sustainability assurance: SFI and FSC, <https://academic.oup.com/jof/article/97/11/33/4614015>
- Today over 350 million acres of forests in North America are certified to SFI

A proliferation of new standards and sustainability programs in the agriculture sector suggest material changes to farmland ownership and operations

- Data-driven approaches
 - Field to Market and Fieldprint Calculator. <https://calculator.fieldtomarket.org/#/>
- Niche market approaches
 - Fair Trade USA <https://www.fairtradecertified.org/>
- Prescriptive approaches
 - Round Table for Responsible Soy
 - <http://www.responsiblesoy.org/certification/production/?lang=en>
- Outcomes-based approaches
 - Leading Harvest <https://www.leadingharvest.org/>

Presenter Bios

Marisa N. Bocci
Partner at K&L Gates

Marisa Bocci is a partner in the firm's Seattle office. She works on a range of transactional matters, including purchase and sale agreements, joint venture arrangements, and leasing. Ms. Bocci has extensive experience advising asset managers and institutional investors on direct investing, co-investments, joint ventures, and other investment strategies relating to real assets in a variety of sectors.

In the agriculture sector, Ms. Bocci has specific experience in matters relating to farmland real estate investments. She handles transactions across the country involving the purchase, sale, leasing and financing of farmland. Further, she is familiar with operational issues specific to the food packing and processing industry, including supply chain, labor, and AgTech matters. In addition, she also advises clients on agribusiness-related M&A transactions. Ms. Bocci regularly speaks and writes on agribusiness topics.

Ms. Bocci works on wind, solar, mineral, and timber portfolio matters for her institutional investor clients. Some of these activities are in conjunction with other agribusiness operations; others are standalone natural resource investments. She advises on water infrastructure projects, water rights dispositions and acquisitions (including trust arrangements), and private water share or water utility district arrangements. Of special interest, Ms. Bocci often advises clients on their Bureau of Reclamation water arrangements.

Buck B. Endemann
Partner at K&L Gates

Buck Endemann is a partner in the firm's power and environmental practice groups and focuses on developing, buying, and selling renewable energy projects throughout the Western United States, with an emphasis on California. He provides comprehensive counseling on energy, energy storage, infrastructure and remediation projects and regularly advises clients on air, water, species, waste and land use issues, and represents clients in related litigation and administrative proceedings. Mr. Endemann has a particular expertise on sustainability and climate issues and also is involved in the firm's bioenergy initiative and helps clients navigate the federal Renewable Fuel Standard and California's Low Carbon Fuel Standard.

Mr. Endemann speaks and writes regularly on a number of renewable energy and cleantech issues, and is the editor of the firm's Energy Storage Handbook. He also authors the K&L Gates Energizer, a biweekly newsletter summarizing developments in distributed energy resources, electric vehicles, and energy blockchain technology. He is a current board member of the Center for Sustainable Energy and is the past secretary of the San Francisco Bay Area Chapter of Young Professionals in Energy.

Kenny Fahey
Working Lands Principal at The Conservation Fund
Interim Executive Director at Leading Harvest

As the Working Lands Principal for The Conservation Fund, Kenny works across the Fund's working lands portfolio with a focus in sustainable agriculture and farmland conservation. He brings the tools of finance, conservation, and entrepreneurship to support new, 21st century models to sustainably manage natural resources for economic and environmental outcomes. Kenny's background is in impact finance and natural resource policy and management.

In addition to his role at The Conservation Fund, Kenny serves as the interim Executive Director for Leading Harvest, a newly created nonprofit that offers a comprehensive and credible response to increasing demands across the agricultural value chain for sustainability assurance. He joined The Conservation Fund in 2015 and helped launch Leading Harvest in 2020.