Agricultural Law Update

The Official Newsletter of the

AMERICAN AGRICULTURAL LAW ASSOCIATION

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Inside This Issue

A Word from the Editors

Welcome to the Spring Issue of the Agricultural Law Update! It seems there are changes all around us these days, and that includes here on the pages of the Update. That's because we've incorporated several new ideas to keep the Update relevant and useful to our members. You'll first see a section called "Practice Tips" in which members share tips on technology, research, teaching, negotiating, drafting, or anything else that might help us do what we do as agricultural attorneys. We're also bringing our award-winning student scholars to the Update in the "Students at Work" section. Many of you will recall Drew Kershen's "Agricultural Law Bibliography," a tradition carried on by the National Agricultural Law Center and now once again highlighted in the Update. And finally, we'll diversify how we present our "Feature Articles" each month, with the aid of a content expert member who is willing to serve as a one-time "Issue Editor." For this issue, our focus is on water law and we strong-armed Jesse Richardson into serving as the Issue Editor. The articles Jesse rounded up revolve around current issues in water law and present member's responses to recent water law developments from the Trump Administration and the U.S. Supreme Court.

We hope you'll enjoy these additions to the Update and that they'll benefit you in your practice. Please feel free to let us know what you think, and send us your practice tips for the next issue!

Many thanks to each of the members who've written for this Spring Issue. We are grateful for your willingness to share your expertise with AALA members.

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Practice Tips

We've gathered several tips from AALA members that may aid you in your practice. If you have a tip to share, please send it to the editors.

Consider Cloud Computing
Robert Moore

Robert and his wife Kelly own Wright & Moore Law Co. LPA in Delaware, Ohio. Having grown up on a family farm in eastern Ohio, Robert focuses his practice primarily on agricultural law, with an emphasis on farm succession planning.

About five years ago our firm transitioned to exclusively cloud computing. This has been a good decision for our firm but as with any firm management decision, there are pros and cons. The following are a few of the pros and cons we have experienced:

Pros:

- Less cost. We no longer need to buy servers and the vast majority of our IT needs are included in our contract fees. We need to replace computers less often because the remote computing takes less computing memory and processing power.
- Reliability. Other than periodically scheduled maintenance, access to the cloud computing is 99% reliable. It is very rare that we cannot access our provider.
- Security. I feel our client information is more secure on the cloud. Our provider works exclusively with law firms and therefore is sure to be compliant with state bar and ABA security guidelines. Data is encrypted in transit between our computers and the provider. Client files are on redundant servers housed in limited access, secure locations with power backup. In the past, someone breaking into our office and walking off with our server was a much bigger security concern than cloud computing is now.
- Software automatically updated. Our Microsoft Office suite is included in our subscription fee and we never need to update licenses or software. Our provider also installs third-party vendor software as part of our fees.

Cons:

- Control of files. While I feel our clients' files are more secure with cloud computing, what if the provider abruptly shuts down without notice? This is a risk of cloud computing. We negate most of this risk by backing up our files on a separate cloud backup service and every two weeks I also backup our files to an encrypted hard drive which I store in a secure location.
- Printing. Our printing has never worked exactly like we wanted. It's slower than printing from a local server and some printer options are not always available.
- Internet Speed. You must have fast internet. I suggest having at least 50 Mbps download speeds and the more the better. Our internet is about 300 Mbps download and works well.

You may want to consider cloud computing. It has worked very well for our firm and we have no regrets in making the transition.

Using Filters in Westlaw Research
Kevin Hivick

Kevin is a Research Fellow with the National Agricultural Law Center and a rising 3L at Washington & Lee University, where he serves as President of the W&L Agricultural Law Society. Kevin will spend the summer of 2020 as a Summer Associate at Steptoe & Johnson PLLC.

Thorough research is the foundation of any successful legal project. Aggregate online databases such as Westlaw and Lexis Advance provide legal practitioners with a litany of choices for conducting this research. However, these services are constantly evolving, and keeping up to date with features and search options can prove difficult.

Conducting a series of Boolean searches will often yield thousands of results. Utilizing the proper search filters can help to sort and refine these results. When conducting legal research for the National Agricultural Law Center, I often find it helpful to set filters for jurisdiction, date, and procedural posture. Recently, Westlaw introduced a feature that allows the user to restore previous filters. This can help you to move through a series of searches much more efficiently. Additionally, Westlaw now allows the user to apply filters to previously viewed or saved results. Utilizing history and bookmarking functions can help you to quickly resume searches and refine results when conducting long-term projects. Tools such as these will ensure you target the most relevant sources and help you complete complex research on any number of topics.

When Litigation Doesn't Fit - Try Agricultural Mediation

Jackie Schweichler

Jackie is a Staff Attorney with the Center for Agricultural and Shale Law at Penn State Law. She is also the Program Coordinator for Pennsylvania's Agricultural Mediation Program.

Living next to a farm can be a wonderful, life-enriching experience. In some situations, however, neighbors can perceive it to be a loud, dirty, and smelly inconvenience. Disputes between farmers and their neighbors are often inevitable and can lead to years of toxic bickering.

While working with your client to solve these sometimes petty, but overwhelming, disagreements, you may find yourself in a situation where litigation isn't the answer. Especially with small family farms, the cost of a lawsuit may far exceed the value of the problem. In these situations, attorneys should consider recommending the USDA's Agricultural Mediation Program.

Currently, 42 states offer mediation services to the agricultural community through the USDA program. In the past, state mediation programs have been primarily used for disputes arising from agricultural loans or other actions relating to USDA agencies. In the 2018 Farm Bill, however, the program was expanded to include farm-related lease issues, family farm transitions, and farmer-neighbor disputes, among other topics.

After requesting mediation through a state mediation program, parties involved in the dispute will meet at a mutually agreed upon time with a mediator assigned through the program. Mediation can be accomplished in one meeting or may take several sessions depending on the complexity of the issues and the number of participants. If an agreement is not reached, the case is closed, and all parties remain free to pursue other available administrative appeals and/or legal action. The cost of mediation varies by state but is usually minimal and sometimes even free.

In the future, if your client brings you a "non-legal" issue or something that sounds like a simple neighborly disagreement, consider whether mediation would be in your client's best interest. To learn more about the agricultural mediation program in your state, check out https://agriculturemediation.org/

Students at Work

Our student work feature this issue comes from Travis Buck, a 2020 graduate of Penn State Law. Travis received the first-place award in AALA's 2019 Student Paper Writing Contest for his article, *Capper-Volstead & Output Restrictions: The Good, The Bad, and The Ugly*. Travis provides an engaging review of the historical, economic and political underpinnings of the nearly century-old Capper-Volstead Act that explains why the Act aims to provide limited antitrust immunity for agricultural producers. Travis also explores important contemporary issues for Capper-Volstead, such as whether the Act allows producers within a single cooperative to agree to restrict output and how output restrictions interact with modern agricultural policy. Congratulations to Travis for his outstanding scholarship. We encourage readers to watch for the article in the upcoming issue of the *Drake Journal of Agricultural Law*.

AALA Board Member Ross Pifer presents Travis Buck with the AALA Student Paper Writing Contest First Place Award.

The Agricultural Law Bibliography

We appreciate the ongoing work of Professor Drew Kershen, who each quarter compiles an Agricultural Law Bibliography. The National Agricultural Law Center maintains an archive of all of Drew's Quarterly Updates at https://nationalaglawcenter.org/ag-law-bibliography/quarterly-updates/. The bibliography made a regular appearance in the long-ago printed version of the Agricultural Law Update, so we've brought it back. The Quarterly Update for the first quarter of 2020 is below.

Animal Rights
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Meagher & Thompson, Before We Make a Pig's Ear of It: How North Carolina Hog-Farming Nuisance Suits Provide Context for the Ethics of Gene Editing Livestock, 97 N.C. L. Rev. 1273-1327 (2019).

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Note, Poland: Winds of Change in the Act on Windfarms. 47 GA. J. INT'L. & COMP. L. 591-605 (2019).

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Arayess, The Netherlands: Focus Points of the Netherlands Food and Consumer Product Safety Authority in 2020, 15 EURO. FOOD & FEED L. REV. (2020).

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Note, Don't Cry over Plant-Based Milk: Why the Use of the Term "Milk" on non-dairy Beverages Does Not Constitute "Misbranded" under the Federal Food, Drug, and Cosmetic Act, 14 J. HEALTH & BIOMED. L. 481-515 (2018).

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Gambert, Got Mylk? The Disruptive Possibilities of Plant Milk, 84 BROOKINGS L. REV. 801-871 (2019).

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Hunger and Food Security Issues
Note, Owning the World's Seed Supply: How Seed Industry Mergers Threaten Global Food Security, 31 GOE. ENTVL. L. REV. 563-579 (2019).

McLeod-Kilmurray, Does the Rule of Ecological Law Demand Veganism? Ecological Law, Interspecies Justice, and the Global Food System, 43 VT. L. REV. 455-483 (2019).

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Reville, Rice Paddies on The White House Lawn: CFIUS and the Foreign Control Requirement, COLUMBIA J. RACE & L. 114–168 (2020).

Public Lands
Zellmer, Mitigating Malheur's Misfortunes: The Public Interest in the Public's Public Lands, 31 GEORGIA ENVTL. L. REV. 509-561 (2019).

Leshy, The Interaction of U.S. Public Lands, Water, and State Sovereignty in the West: A Reassessment and Celebration, 41 PUB. LAND & RESOURCES L. REV. 1-25 (2019).

Rural Development
Haksgaard, Rural Practice as Public Interest Work, 71 ME. L. REV. 209-226 (2019).

Romero, Viewing Access to Justice for Rural Mainers of Color through a Prosecution Lens, 71 ME. L. REV. 227-243 (2019).

Eisenberg, Distributive Justice and Rural America, 61 BOSTON COLLEGE L. REV. 190–251 (2020).

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Schmidt, Hanspeter & Haccius, Analysis of Regulation (EU) 2018/848 on Organic Food: New Rules for Farming, Processing, and Organic Controls, 15 EUROPEAN FOOD & FEED L. REV. 2–17 (2020).

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Comment, Doesn't Look Like Anything to Me: Protecting Wetlands by Narrowing the Definition of "Waters of the United States", 7 LSU J. ENERGY L. & RESOURCES 223-244 (2019).

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Feature Articles: Water and Agricultural Law

This issue of the Agricultural Law Update focuses on water law. In teaching and practicing water law, I quickly realized that water law is agricultural law. Water and agriculture are inexorably intertwined. Agriculture accounts for approximately 80% of the consumptive use of water in the United States, up to 90% in some states. Irrigation and Water Use, United States Department of Agriculture, Economic Research Service, available at https://www.ers.usda.gov/topics/farm-practices-management/irrigation-water-use/ (last accessed on June 2, 2020). Irrigated agriculture accounted for about half of the total value of crop sales in 2012. *Id.* Water also directly supports livestock and poultry production, but relatively small amounts are used in comparison to crop production. Through consumption of crops by livestock, however, irrigated agriculture supports those sectors. *Id.*

In fact, meat production uses large amounts of water. For, example, Bovine meat has a water footprint of 15,415 cubic meters of water per ton meat, while the footprint for eggs is 1,425 cubic meters per ton. M.M. Mekonnen and A.Y. Hoekstra, *The Green, Blue and Grey Water Foot Print of Farm Animals and Animal Products*, p. 29 (UNESCO-IHE, December 2010), available at https://waterfootprint.org/media/downloads/Report-48-WaterFootprint-AnimalProducts-Vol1_1.pdf (last accessed June 2, 2020) . Vegetables use 322 cubic meters of water per ton of production. *Id.*

Conflicts centered on water are more prevalent in the dry western United States, but with increasing droughts, conflicts have spread to the East. With increased conflicts, more litigation has followed. Conflicts involve both water quality and water quantity. The featured articles that follow gives perspectives on two Clean Water Act issues that promise to have profound impacts on agriculture. One final article focuses on an emerging water quantity issue that centers on agriculture.

Jesse Richardson, Issue Editor

TOPIC ONE: *The Navigable Water Protection Rule*

Overview of the Navigable Water Protection Rule: Ghosts that We Knew[1]

Anthony Schutz

Anthony is an Associate Professor of Law with the College of Law at the University of Nebraska-Lincoln, where he teaches agricultural law, environmental and natural resource aw, and state and local government. Readers may recognize Anthony as the speaker for the Environmental Law Update at our annual conference.

The Clean Water Act's central provision prohibits the discharge of pollutants without a permit. The CWA defines a "discharge of pollutants" with reference to both the source and the destination of pollutants. Specifically, the phrase means "any addition of any pollutant to navigable waters from any point source." There have been fights over nearly every word in this definition. But, for over 40 years, one of the most important fights has been about the term "navigable waters." The term "navigable" has a long history and it, in a nutshell, traditionally delineates those waters that are subject to commercial navigation. The CWA, however, is not at all clear about what to do with the term "navigable" because its statutory definition of the term "navigable waters" is "the waters of the United States." As any lawyer can attest, confusion often ensues when a definition defines a term by repeating the term it is supposed to define (waters), omits any reference to the term's traditional meaning (navigability), and adds a patriotic "of the United States" to the mix.

Ever since the year of my birth, the bounds of this language have haunted regulators and the regulated community. Usually, of course, words are given meaning by the context within which they are used. Here, that context can reasonably drive a very expansive interpretation. The CWA's goal of restoring and maintaining the quality of even the most navigable waters cannot be accomplished by focusing only on those waters. This would be like trying to cure heart disease in a population by focusing only on physical modifications to the heart. The illness, however, involves systems and inputs that are much broader. Attention turns immediately to the genetic influences and other aspects of one's biology. But it also involves lifestyle influences like diet, exercise, stress, and drug use. Influencing that behavior, of course, involves everything from an affordable healthy accessible food supply to ensuring opportunities and access to places or equipment where people can exercise. A concern for water quality in waters that are at the heart of federal authority immediately requires attention to the tributaries and drains bringing pollution to the system and wetlands that help hold water and store or consume some pollutants. But it also can reasonably involve activities on a landscape scale that put pollutants into the system for rainfall to carry to the nation's great waterways. As a result, the water-quality context supports broadly defining the scope of the CWA, which is at the heart of defining its jurisdictional reach. And for decades, all of that has been brought to bear on the term "navigable waters."

[1] With all due respect to Mumford & Sons.

To make matters more complicated, the interpretation of statutory text occurs within an institutional framework that distributes interpretive power to different institutions. Here, the EPA, the U.S. Army Corp of Engineers (COE), and the judiciary are the primary interpreters of this difficult language. Each carries with it a function and scope to its power in our federal governmental system. And, because this is a federal statute, the scope of Congressional authority haunts the inquiry.

The agencies took the first crack at it in 1976. To them, the CWA's goal of restoring and protecting water quality meant that the term should be interpreted broadly. As a result, they interpreted the term to include traditionally navigable waters, tributaries, and wetlands adjacent to those waters. The agencies, however, went farther than that and also defined the term with reference to the scope of federal power, extending the definition to include waters that cross state boundaries and intrastate waters that could be used or misused in a way that affects interstate commerce. The commerce-clause extension was premised upon Congress's use of a patriotic but unclear "of the United States" in its definition of "navigable waters."

Challenges ensued. The first case, *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), validated the regulatory definition insofar as adjacent wetlands were concerned, at least in those circumstances where the distinction between land and water is a difficult one. At issue was a real estate development that sought to fill what I envision as swamps and marshes in the riparian area of a river. These are the sorts of areas that are often thought of as, well, wet land, occupying the margin between dry land and the river proper. Including them within the scope of the term "navigable waters" is therefore a stretch. But the agencies concluded that these areas have sufficient impacts on water quality to be within the scope of a reasonable interpretation of Congress's oddly framed text. The Court agreed. In fact, litigants successfully argued that Congress did too. After the 1976 regulatory effort, Congress did look into rolling back the definition, but it refused to do so. This acquiescence factored into the Court's analysis.

In 1986 (and 1988), the agencies took another swing at defining WOTUS, kind of. In conjunction with what purported to be a final rule that was a restatement of how they had been treating the term WOTUS, the COE provided in a preamble that its regulations would cover waters with commerce-clause attributes. Such attributes included use by migratory birds or endangered species, as well as irrigation use. The WOTUS rule covered commerce-clause sorts of waters for nearly a decade before the 1986 restatement and explanatory preamble sought to explain what that meant.

The 1986 rule and its use of the migratory-bird rationale came to litigation in 2001 in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), when the COE asserted jurisdiction over an isolated gravel pit under the commerce-clause regulatory language, using the migratory-bird rationale. The Court was not impressed, concluding that Congress had not clearly indicated that "navigable waters" or WOTUS was to be interpreted to the edge of Congress's commerce-clause authority and, as a result, the Court would not countenance such an interpretation. Using the patriotic "of the United States" in the definition of "navigable waters" did not, according to the Court, mean that "navigable" could be ignored. As a result, "nonnavigable, isolated, intrastate waters" were not within the scope of the term "navigable waters."

But the Court provided little guidance on what was within the scope of the statutory language. And, being a Court, it was probably right not to do that. Such guidance is more squarely within the scope of legislative or administrative actors' functions. Regulatory rewrites started and sputtered in the early 2000s and did not culminate in a new rule. Then came *Rapanos v. United States*, 547 U.S. 715 (2006), where the Court was faced with COE assertions of jurisdiction over wetlands that were not adjacent in the *Riverside Bayview* sense, but also not isolated in the *SWANCC* sense. They were somewhat connected to surface water features like tributaries and ditches that had an unknown amount of flow in them and a potentially weak (in some sense) connection to traditionally navigable waters. But, ultimately, as is nearly always the case, all water flowed to a traditionally navigable water.

The never land that these wetlands presented to the Court proved difficult for it to navigate, badly splintering the Justices into three camps. The losing camp (the dissent) concluded these wetland areas were within the scope of "navigable waters" because they had an impact on water quality and the agencies with expertise had reasonably concluded that to be the case. The rest of the Justices were less open to COE jurisdiction. Scalia's camp (with three other Justices) would require a relatively permanent presence of water in the tributaries near the wetlands, as well as adjacency between the wetlands and the ditches or drains consisting of a "continuous surface connection that creates the boundary-drawing problem we addressed in *Riverview Bayside*." Scalia's camp was more focused on the term "waters" than on the scope of CWA coverage that is necessary to protect water quality within navigable waters. Kennedy's camp (of one) opted for a "significant nexus" test to get at the idea of some areas being so important to water quality that they deserved inclusion, so long as the agencies made such a judgment. To Kennedy, the chemical, physical, and biological integrity of traditionally navigable waters was the focus of concern, and the wetlands had to be judged with respect to their impact on that. The Court sent the cases back for more fact finding and evaluation under the standard(s) that the Court had enunciated.

While the lack of guidance in *SWANCC* was problematic and did not lead to rulemaking, the Court's willingness to write its own rules in *Rapanos* (as problematic as it is for a Court to do that) did trigger administrative action. With two possible statutory readings from the Court that would garner the agreement of at least five Justices, the agencies set to work synthesizing the standards in guidance documents that it issued in 2007 and 2008. The guidance documents were complicated, with concepts of tributaries and adjacency interwoven with standards of automatic coverage and case-by-case

significant-nexus inquiries.

The non-regulatory aspect of the 2007-08 guidance and the uncertainty associated with it all ultimately led to rulemaking. In addition, the Court's opinions in *SWANCC* and *Rapanos* provided some encouragement for a new rulemaking. Throughout all of this litigation, it remained unclear if there was any deference available for the agencies' statutory interpretation. In *Riverside Bayview*, the Court seemed deferential. The migratory-bird stuff, of course, wasn't a rule and didn't get deference, and the commerce-clause federalism problems made deference difficult to discern in *SWANCC*. In *Rapanos*, Chief Justice Roberts separately concurred to mention the role that deference could have played post *SWANCC* had the agency accomplished rulemaking. Of course, Roberts was not so strongly driven by agency involvement to refrain from joining Scalia's opinion, which arguably provided rules under the guise of statutory interpretaion.

Given all of that, 2015 brought an effort at rulemaking. The so-called Obama Rule sought to bring clarity to the definition, largely working on the chart platted in the 2007 and 2008 guidance, which was a synthesis of the Scalia and Kennedy camps. At the margin, of course, was the significant nexus-inquiry, with a common core of traditionally navigable waters and tributaries with surface connections that involve sufficient flow over time.

The 2015 rule met litigation early and often. Mired in procedural irregularities, litigants also questioned it as a substantive overreach. And upon Trump's ascendance, the agencies took various paths toward its demise. They tried putting an effective date on the regulation, to no avail (there is still law that we must follow concerning rule amendments). But, ultimately, the agencies repealed the 2015 rule with a 2019 rule that replaced the 2015 rule with the regulations that remained relatively unchanged since 1976. The litigation pending against the 2015 rule was effectively over.

Just this year, the agencies enacted the Navigable Waters Protection Rule. And today we are awaiting the progression of litigation attending its effort at defining "navigable waters." Whether much has really changed is a good question. Generally, it covers traditionally navigable waters (of course), perennial or intermittent tributaries, and adjacent wetlands. The adjectives (perennial, intermittent, and adjacent) get a great deal of attention in these rules. And to drive the notion of certainty further, the rules say more about what is not covered than any set of rules preceding them. The final rule document is a behemoth of an undertaking, weighing in at 92 pages of the *Federal Register*. Notably, however, most of its explanation is legal in nature. Time will tell whether or not the lack of technical hydrologic evaluation has any impact on the rule's reasonableness as an interpretive endeavor.

Procedural challenges notwithstanding, I think these rules would satisfy the Scalia camp. Kennedy would probably regard them as too narrow in light of his significant nexus standard, but he might also have concluded that they were a reasonable interpretation of the statutory text. Indeed, the scope of judicial deference to agency interpretations may be one significant issue in the fights to come. And the courts confronting that question might be filled with judges who are somewhat hostile to the notion of agency deference.

Additionally, if this regulation in any way covers more (or fewer) hydrologic features than the Court would have covered in *Rapanos* (or *Riverside Bayview* for that matter), then these regulations will present a difficult question of what an agency can do in light of prior judicial statutory interpretations. And that question may, in turn, depend on the extent to which the Court derived its interpretation from the "plain meaning" of the statutory text. It is unclear whether or not this rulemaking places courts in the position of having to confront that specter. But they will have enough ghosts to confront as they sort out this fight.

Member Responses to the New Navigable Water Protection Rule

The Long Wait is Not Over: Thoughts on the Navigable Water Protection Rule

Jim Bradbury

Jim practices law as the owner of James D. Bradbury, PLLC in Fort Worth, Texas. He represents clients in litigation of all types, including water litigation. Jim is also an adjunct professor at the Texas A&M University School of Law, where he teaches agricultural law.

The extent to which the federal Clean Water Act (CWA) applies to private lands has been in dispute as long as the Act has been around. During the passage of the CWA, much of the debate centered around the loss of state authority over private land use within their sovereign boundaries. Since passage, whether certain waters, wetlands, dry steam beds, ditches and ponds are jurisdictional has been an endless legal odyssey that has hung over private landowners like a dark cloud.

The US Supreme Court, in the absence of clarity from Congress, tried mightily for years and left us with a word salad opinion in *Rapanos*. That opinion left lawyers, landowners and even the EPA itself largely bereft of any solid principles on which to govern the jurisdictional scope of the CWA. From there, EPA and the Army Corps of Engineers ventured forth armed with the "Nexus" test, a lengthy recitation of principles that is neither easy to explain and even more difficult to apply. The central thread through these decades of dispute is a landowner's right to clearly know whether his private property is subject to federal

jurisdiction and if so, where. Purchasers, developers, farmers and ranchers buy property knowing whether it is subject to easements or in the flood plain but it's anyone's guess as to whether the property will be subject to the CWA. Certainty and consistency in application of the Act has been lacking almost since the Act was passed.

The Obama administration spent significant time and political capital in passing the Waters of the US ("WOTUS") rule, which became final in 2015. It was held up as the clarity that the Act had always needed. The opposition against the new rule was quick and fierce. Lawyers on behalf of states, trade associations and agriculture groups filed suit to invalidate the rule. Suits were filed in courts of appeal and district courts all across the United States, while injunctions were entered in some states and not others. Chaos. Then President Trump was elected.

In one of his first acts as President, Donald Trump issued an Executive Order promising to end the WOTUS rule and replace it with a clearer rule aligned closely with the *Rapanos* opinion of the late Justice Scalia. The Trump administration has reckoned with the glacial, litigation-prone process of the Administrative Procedure Act. Just this month, the replacement rule now known as the Navigable Waters Protection Rule ("NWPR") was published and will become final in June. The NWPR opted for clear categories of inclusion and clear categories of exclusion. From a document organization standpoint, it gets an A. But from the standpoint of private landowners, the banking industry, developers and working farms and ranches, it moved the ball but not much. Knowing whether your barn project or dirt moving will be later determined to be subject to daily fines and penalties is still an ongoing risk. To many, the passage of the NWPR is the end of CWA tyranny, but I fear that the tyranny of uncertainty does indeed remain.

CWA, WOTUS, NWPR: How this Alphabet Soup Keeps Lawyers in Business and Landowners Frustrated

Amber S. Miller

Amber is a partner with Crenshaw, Dupree & Milam, LLP in Lubbock, Texas. She specializes in agricultural law, business, commercial and civil litigation, administrative law, and water law, and is currently AALA's Past President.

The Clean Water Act was passed by Congress in 1972, and ostensibly served to define what waters on private lands were subject to federal authority and rules addressing water pollution. The stated purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." The question of "what are the nation's waters?" has resulted in nearly fifty years of administrative rule drafting, re-drafting, and litigation. Today, the "waters of the United States" definition is still a murky one.

The most recent decade-plus long battle has stemmed from the United States Supreme Court ruling in *Rapanos v. United States* (2008). There, the court issued a split plurality decision (4-4-1), and Justice Kennedy's single vote and opinion provided that the CWA could apply to land whose waters had a "significant nexus" to regulated waters. The factors that were equal to a "significant nexus" were less than clear in application, and further confusion and litigation ensued.

Since then, two different administrations, acting through the EPA, have attempted to provide "clarity" to the question of "how far does the CWA reach?" Now commonly known and referred to as WOTUS, the EPA during the Obama administration issued an administrative rule construing the CWA. Almost as soon as the rule was released, it was subject to a litany of court challenges, including those from farm and trade groups, who largely complained that the rule effectuated a massive federal overreach and violation of private property protections.

More recently, the EPA under the Trump administration has repealed WOTUS and crafted a new rule, "Navigable Waters Protection Rule". So, WOTUS is now NWPR. And NWPR is to further define the CWA. The alphabet soup enrages those outside of the Beltway.

Even so, many see the NWPR as the answer they have been waiting on. Others, however, argue NWPR is merely a wolf in sheep's clothing, and too much potential for federal overreach remains. So, as with seemingly any new high-profile administrative rule, litigation emerges.

Even those within agriculture can't agree on whether the new federal rule is favorable or detrimental for private property owners. From cattlemen and ranchers in New Mexico, Oregon, and Washington claiming that the NWPR still has lingering "federal overreach" problems, to the American Farm Bureau Federation's position that the NWPR "draws a reasonable and lawful line between federal and state jurisdiction," one thing is certain: the question of CWA jurisdiction remains one of muddied waters.

To be sure, this can be seen as "good work" for lawyers and policy wonks who live for debating the meaning of words, and the application of statutes and regulations to "real life" examples. But, for those who farm, ranch, negotiate easements, buy and sell property, or plan and develop land, the uncertainty surrounding CWA jurisdiction is nothing short of frustrating. Today's world has its own new uncertainties. The question of CWA jurisdiction, fifty years later, shouldn't be among them.

The Supreme Court's Decision in County of Maui v. Hawaii Wildlife Fund

Tiffany Dowell Lashmet

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The County of Maui operates a wastewater reclamation facility that pumps approximately 4 million gallons of treated effluent per day into the groundwater via four disposal wells. The effluent travels through the groundwater approximately half a mile to the Pacific Ocean.

In 2012, environmental groups filed a suit against the County claiming they were violating the Clean Water Act by discharging a pollutant (the effluent) into a water of the United States (the Pacific Ocean) without the required NPDES permit. The County argued no permit was required because there was no discharge into the Pacific Ocean, only into groundwater, which is not a water of the United States.

Both the trial court and the US Court of Appeals for the Ninth Circuit found that the Clean Water Act was applicable despite the discharge into the Pacific Ocean being indirect and traveling through the non-jurisdictional groundwater. The United States Supreme Court granted the petition for certiorari and issued its opinion on April 23.

Majority Opinion

Justice Breyer wrote for the majority (Ginsburg, Kagan, Sotomayor, Roberts, and Kavanaugh) in creating a "functional equivalent" test.

In rejecting the parties' arguments, the Court indicated that the "fairly traceable" test urged by the environmental groups was too broad as nearly all water makes its way to a water of the United States and the power of modern technology allows tracing back over many miles, many years, and even in highly diluted forms. Conversely, the Court feared that requiring direct discharge from the point source to the water of the United States was too narrow and would allow parties to evade the Clean Water Act.

Instead, the Court adopted a "functional equivalent" standard. "We hold that the statute requires a permit when there is a direct discharge from a point source into navigable waters or when there is the *functional equivalent of a direct discharge*." In other words, a permit is required when a "point source directly deposits pollutants into navigable waters, or when the discharge reaches the same result though roughly similar means."

By way of example, the Court explained "where a pipe ends a few feet from navigable waters and the pipe emits pollutants that travel those few feet through groundwater (or over the beach), the permitting requirement clearly applies. If the pipe ends 50 miles from navigable waters and the pipe emits pollutants that travel with groundwater, mix with much other material, and end up in navigable waters only many years later, the permitting requirements likely do not apply."

The Court recognized the difficulty in applying this to the "middle instances." The Court identified seven factors that could potentially be considered depending on the circumstances of the specific case: (1) transit time; (2) distance traveled; (3) the nature of the material through which the pollutant travels; (4) the extent to which the pollutant is diluted or chemically changes as it travels; (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source; (6) the manner by or area in which the pollutant enters the navigable waters; and (7) the degree to which the pollution (at that point) has maintained its specific identity. The Court stated that time and distance will be the most important factors in most, but not necessarily all, cases.

The Court expects that guidance will come from lower court cases, EPA guidance, rulemaking, and permitting options.

Kavanaugh Concurrence

Justice Kavanaugh issued a concurring opinion essentially opining that the majority opinion is consistent with the Justice Scalia plurality in *Rapanos v. United States*, 547 U.S. 715 (2006) and noting that the "source of the vagueness is Congress' statutory text, not the Court's opinion."

Alito Dissent

Justice Alito's first paragraph pulls no punches: "If the Court is going to devise its own legal rules, instead of interpreting those enacted by Congress, it might at least adopt rules that can be applied with a modicum of consistency. Here, however, the Court makes up a rule that provides no clear guidance and invites arbitrary and inconsistent application. " Instead, he would hold "a permit is required when a pollutant is discharged directly from a point source to navigable waters."

Alito also addresses the need for certainty for private parties to know whether a permit is required and believes the public should not be left with a "nebulous" standard from the Court. "How the rule applies to 'middle instances' will be anybody's guess. Except in extreme cases, discharges will be able to argue that the Court's multifactor test does not require a permit. Opponents will be able to make the opposite argument. Regulators will be able to justify whatever result they prefer in a particular case. And judges will be left at sea."

Thomas Dissent

Justice Thomas' dissent was joined by Justice Gorsuch. They would "adhere to the text" of the Clean Water Act and hold "that a permit is required only when a point source discharges pollutants directly into navigable waters." They believe the majority improperly "departs from the statutory text" by adopting the

functional equivalent test.

Thomas believes the Court should not focus on the meaning of the word "from," but instead on the meaning of the word "addition," which he believes excludes anything other than a direct discharge. "When a point source releases pollutants to groundwater, one would say that the groundwater has been augmented with pollutants from the point source. If the pollutants eventually reach navigable waters, one would not naturally say that the navigable waters have been augmented with pollutants from the point source. The augmentation instead occurs with pollutants from the groundwater."

He argues the prepositions "to' and "from" reinforce this reading. When pollutants are released from a point source, they are released to the next source (such as groundwater) from the point source. If the pollutants later make their way into a WOTUS, they are released from the groundwater to the WOTUS. One would not naturally say pollutants were added to the navigable waters from the original point source.

Member Responses to *County of Maui v. Hawaii Wildlife Fund*

Judicial Activism AKA Tyranny: Congress' Lack of Clarity and Inability to Clarify the CWA Does Not Grant Nine Justices the Leave to Legislate

Blair Dunn

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It is more than a tacit admission that prevails throughout the majority and dissenting opinions in Maui County that what animates the Court to come up with a rule of its own is the lack of clarity in the law passed by Congress and then a failure of Congress to act to correct the lack of clarity. Justice Kavanaugh's concurring opinion openly admits this point stating, "[T]he source of the vagueness is Congress' statutory text, not the Court's opinion. The Court's opinion seeks to translate the vague statutory text into more concrete guidance." Such a transparent trampling of the separation of powers provided for in our Constitution to have the Court take up the task of legislating for Congress is cause for concern for good reason.

Our Framers knew of this danger, though I doubt they contemplated it in the subject matter arena of Waters of the United States in context of clean water legislation, and were careful to establish a tripartite form of government that kept the Judiciary removed of the power to legislate in order to preserve the Liberty our Republic was based upon. Alexander Hamilton said, "There is no liberty if the power of judging be not separated from the legislative and executive powers." Federalist 78, Federalist Papers (Clinton Rossiter, ed., New York: Penguin Books, 1961). Thus, when the Supreme Court strays into judicial activism to legislate because Congress has failed to do an adequate job in the Court's opinion, the Court has engaged in the very judicial tyranny that Thomas Jefferson warned against stating "[O]ur judges are as honest as other men and not more so. They have with others the same passions for party, for power, and the privilege of their corps . . . and their power the more dangerous as they are in office for life and not responsible, as the other functionaries are, to the elective control. The Constitution has erected no such single tribunal, knowing that to whatever hands confided, with the corruptions of time and party, its members would become despots. It has more wisely made all the departments co-equal and co-sovereign within themselves." [1]

[1] Letter from Thomas Jefferson to William C. Jarvis, 1820. Available at https://founders.archives.gov/documents/Jefferson/98-01-02-1540

If You Find Yourself Asking What "Functional Equivalence" Means, Welcome to the Club

Mary-Thomas Hart and Scott Yager, National Cattlemen's Beef Association

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On April 23, Justice Breyer delivered the Supreme Court's opinion in *County of Maui v. Hawaii Wildlife Fund*, a case considering whether indirect discharges to navigable waters are subject to the Clean Water Act. The Court's opinion, joined by five Justices including Chief Justice Roberts, holds that an indirect discharge to navigable waters is subject to the Clean Water Act if it is *functionally equivalent* to a direct discharge. We learned that a pipe which ends a few feet from jurisdictional water is likely subject to permitting, while a pipe that ends 50 miles from jurisdictional water is likely not. But what about the discharges that travel more than a few feet, but less than 50 miles?

Federal courts and the EPA are charged with defining the bounds of "functional equivalence" – a herculean task. The Court's opinion provided a list of factors to consider in making "functional equivalence" determinations, primarily addressing time, distance traveled, and dilution. As courts and the EPA look to better define this standard, they will consider both court precedent and previous agency interpretations. EPA's only detailed consideration of discharges "via a direct hydrologic connection" was in its 2001 proposed CAFO Rule. The Agency did not include this analysis in their final rule, instead concluding that the unique factors which affect subsurface discharges rendered a national standard impractical. Whether *County of Maui* will force EPA to develop a national standard is yet to be seen.

How will *County of Maui* impact existing Clean Water Act agricultural exemptions?

Agricultural producers face new regulatory risks following *County of Maui* – especially those who manage traditionally nonpoint source operations. The agricultural community benefits from two Clean Water Act exemptions; agricultural stormwater and irrigation return flows are not subject to Clean Water Act permitting. It is yet to be seen how these exemptions apply to subsurface pollutant travel, especially as courts consider the composition of irrigation return flows. In *Pacific Coast Federation of Fishermen's Associations v. Glaser*, the Ninth Circuit Court of Appeals confirmed Congress' intent to exempt drainage from farms practicing irrigation-facilitated crop production. However, courts have yet to reach a definitive answer regarding the extent to which composition impacts a particular return flow's exemption. The application of existing exemptions will be key in determining the impact of "functional equivalence" liability on agricultural production.

Will this opinion impact litigation on the Navigable Waters Protection Rule?

Justice Kavanaugh certainly thinks so. His succinct concurrence had one mission - to tie the *County of Maui* decision to Justice Scalia's *Rapanos* opinion. Justice Scalia opined that the Clean Water Act does not merely "forbid the 'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant to navigable waters.'" Will this be enough to sway the other Justices to follow Justice Scalia's plurality when the definition of "waters of the United States" ultimately returns to the Supreme Court? Only time will tell.

Farmers Petition United States Supreme Court for Certiorari in Important Water Case

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DISCLOSURE: The author is one of a group of law professors who filed an amicus curiae brief arguing that the United States Supreme Court should grant certiorari in this case.

In November of 2019, the United States Court of Appeals for the Federal Circuit issued an opinion on a takings case involving the water rights of a group of farmers in Oregon and California. *Baley v. United States*, 942 F.3d 1312 (Fed. Cir. 2019). The case also involves unquantified federal reserved water rights and the interaction of those rights with regulatory takings and the Endangered Species Act. The court rejected the takings claims of the farmers, finding that the water at issued was part of the federal reserved water rights of the Indian tribe.

However, those federal reserved water rights have not been quantified and the federal government had stopped deliveries based on the protection of certain fish species under the Endangered Species Act. The farmers filed a petition with the United States Supreme Court, asking for a writ of certiorari. The petition is presently pending before the Court. In essence, the question in this case is whether a court may find a regulatory taking based on a federal reserved water right that has not been quantified. In other words, how does a court know whether a regulatory taking has occurred in this context when the relative water rights of the parties is unknown?

When the United States removes land from the public domain and reserves the land for public purposes, the United States "reserves appurtenant water then unappropriated to the extent needed to accomplish the purposes of the reservation". *Cappaert v. United States*, 426 U.S. 128, 138 (1976). The right vests on the date of the reservation and is superior to the rights of future appropriators. *Id* (citations omitted). "[O]nly that amount of water necessary to fulfill the purpose of the reservation [is reserved], no more." *Cappaert*, at 141, citing *Arizona v. California*, 373 U.S. 546, 600-601 (1963).

This particular case arises in the context of the Klamath River Basin reclamation project, which straddles the southern Oregon and northern California borders. The project is managed by the United States Department of Interior's Bureau of Reclamation (the Bureau) and supplies water to hundreds of farms comprising approximately 200,000 acres of land. In 2001, the Bureau temporarily halted water deliveries to farmers and irrigation districts to meet the requirements of the ESA. In October of 2001, 14 irrigation organizations and 13 farmers filed suit, alleging, inter alia, a regulatory taking, impairment of water rights and a breach of contract.

A complex series of court proceedings followed, including certification of questions on Oregon water rights to the Oregon Supreme Court, and a finding by the Claims Court that the claims should be analyzed as physical takings. The irrigation organizations and some of the farmers either voluntary withdrew from the case, or had their claims dismissed. As to the remaining plaintiffs, the Claims Court rejected the takings claims, finding that the waters at issue were within the scope of the federal reserved water rights for tribal fishing held by the Klamath Tribes, Yurok Tribe, and Hoopa Valley Tribe, and that these rights were senior in priority to the plaintiff's water rights. The Federal Circuit Court of Appeals affirmed the decision of the Claims Court.

The issue on appeal to the Federal Circuit focused on whether the takings claims should be barred by unadjudicated and unquantified federal reserved water rights of the tribes. Farmer appellants made three main arguments. First, the farmers argued that the tribe's water right should not be equated to the amount of water needed to satisfy ESA requirements. The tribes do not fish or use the fish for any purpose at present.

Second, farmers allege that the tribes' water rights do not extend to Klamath Project water. The project created stored water that was nonexistent at the time of the reservation of the federal water rights. Finally, and perhaps most importantly, the farmers argued that the tribes' water rights may not bar a regulatory takings claim until the water rights have been quantified. The Federal Circuit rejected all of these claims, affirming the holding of the Claims Court. The court found that "the federal reserved water rights of the Tribes need not have been adjudicated or quantified before they were asserted to protect the Tribes' fishing rights." *Baley*, 942 F.3d at 1341.

The farmers filed a petition for writ of certiorari on March 13, 2020. The appellants framed the question presented as:

> Whether, against the legal backdrop of Congress's and this Court's recognition of the primacy of state law to determine, quantify, and administer water rights, a federal court may deem federal agency regulatory action under the Endangered Species Act to constitute the adjudication and administration of water rights for tribal purposes.

Appellants, on the other hand, frame the issue as:

> Whether the Court of Appeals for the Federal Circuit correctly held there was no Fifth Amendment taking of Petitioners' junior water

rights when the Bureau of Reclamation limited delivery of water to them during the drought year of 2001 in order to protect the senior federal reserved water rights of Indian Tribes in the Klamath Basin and thus Petitioners were not legally entitled to receive the water?

The American Farm Bureau Federation, along with the State Farm Bureau organizations of Arizona, California, Colorado, Idaho, Hawaii, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming, were among those filing amici curiae briefs urging the Court to grant the writ of certiorari. The brief emphasized that water is essential to Western farmers and ranchers. The Farm Bureau groups argued that "[t]he decision below eviscerated farmers' and ranchers' reasonable reliance interests."

The fact that the Tribes hold federal reserved water rights is not at issue. The farmers instead challenged the ruling that, in the absence of an adjudication or quantification, that the "Tribes' water rights were at least co-extensive to the amount of water that was required by defendant to satisfy its obligations under the [ESA] …." *Baley v. United States*, 134 Fed.Cl. 619, 679 (2017). The Federal Circuit appears to conflate two distinct legal questions: (1) the law governing the acquisition, volume and scope of a water right and (2) the law governing the administration of water rights in general.

"To determine the purpose of a reservation and to determine the water necessary to accomplish that purpose are inevitably fact-intensive inquiries that must be made on a reservation-by-reservation basis." *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 195 Ariz. 411, 420, ¶31 (1999) ("*Gila III*"). The Federal Circuit Court made no such analysis. In addition, no "zero-impact standard" applies to the protection of federal reserved water rights. *Id*, at ¶ 38. Injunctive relief must be "appropriately tailored" to meet the minimal needs of the primary purpose of the federal reservation." *Id*, citing *Cappaert*, at 141.

The resolution of this case will undoubtedly impact agriculture, particularly in the West. Many senior water rights holders could lose their water rights. However, the impacts could ripple into the Midwest and East as well, given the range of federal interests across the country. If the United States Supreme Court accepts the case, diverse agricultural interests will likely weigh in with amici curiae briefs.

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