Reinterpreting the Clean Water Act:

A discussion of modern challenges to historic Clean Water Act interpretations

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Introduction:

Novel theories of legal liability and regulatory requirements have been introduced to litigation for what has historically been treated by the courts, and federal and state agencies as nonpoint source pollution under the Clean Water Act. The Clean Water Act and its implementing regulations do not define "agricultural stormwater discharges" nor is there an engineering or scientific definition of the term. This outline and presentation will explore the foundational cases and some of the theories involved on this new front.

Relevant key questions:

Are nonpoint sources required to obtain NPDES permits under the clean water act?

What is the extent of the agricultural exclusions from the definition of point source?

Did Congress intend to treat irrigated farming and dry-land farming similarly?

Applicable law:

Statutory Provisions & Brief Legislative History

Section 301(a) of the CWA prohibits "the discharge of any pollutant" into the nation's waters, except when specifically authorized under the CWA. 33 U.S.C. § 1311(a). Without an NPDES permit, a person may not discharge any pollutant to waters of the United States from a point source without being subject to enforcement action and fines. *Id.* §§ 1311(a), 1319; 40 C.F.R. § 19.4.

The Clean Water act defines a "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture." 33 U.S.C. § 1362(14).

The term "discharge of a pollutant"… means (A) any addition of any pollutant to navigable waters from any point source,… 33 U.S.C. § 1362(12)

The 1977 amendments to the CWA excluded "return flows from irrigated agriculture" from the point source definition following the *Train* decision which had declared EPA's regulatory exemption invalid. *Natural Res. Def. Council v. Train*, 396 F. Supp. 1393 (D.D.C. 1975)

The 1987 amendments to the CWA changed the regulatory scheme for industrial and municipal stormwater permits. Congress included an exclusion for "agricultural stormwater discharges" from the definition of "point source" to make clear agricultural was not included in the new stormwater permitting scheme. *Concerned Residents for the Env't v. Southview Farm*, 34 F.3d 114, 120 (2d Cir. 1994).

Section 319 of the Clean Water Act directed states to develop nonpoint source management programs. To aid states addressing nonpoint source pollution, Congress directed EPA to issue "guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants" and "processes, procedures, and methods to control pollution resulting from [] agricultural and silvicultural activities, including runoff from fields and crop and forest lands," among other sources. 33 U.S.C. §§ 1314(f) and 1329.

Federal Regulations

40 CFR § 122.3

The following discharges do not require NPDES permits: …

(e) Any introduction of pollutants from non point-source agricultural and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands, and forest lands, but not discharges from concentrated animal feeding operations as defined in § 122.23, discharges from concentrated aquatic animal production facilities as defined in § 122.24, discharges to aquaculture projects as defined in § 122.25, and discharges from silvicultural point sources as defined in § 122.27.

(f) Return flows from irrigated agriculture…. 40 CFR § 122.3

40 C.F.R. § 122.2

Discharge of a pollutant means . . .(b) Any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation. This definition includes additions of pollutants into waters of the United States from surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works. 40 C.F.R. § 122.2

"Discharge when used without qualification means the 'discharge of a pollutant.'"

Storm water is defined by cross referencing the definition in 40 C.F.R. § 122.26(b)(13): "Storm water means storm water runoff, snow melt runoff, and surface runoff and drainage." This definition was adopted as a part of the municipal and industrial stormwater regulations.

EPA also describes nonpoint source pollution: Nonpoint source pollution generally results from *land runoff, precipitation*, atmospheric deposition, *drainage, seepage or hydrologic modification*. Nonpoint source (NPS) pollution, unlike pollution from industrial and sewage treatment plants, *comes from many diffuse sources*. NPS pollution is caused by rainfall or snowmelt moving over *and through the ground*. As the runoff moves, it picks up and carries away natural and human-made pollutants, finally depositing them into lakes, rivers, wetlands, and coastal waters and ground waters.

Court Rulings Related to the Treatment of Agriculture under the CWA

1. *Concerned Area Residents for the Env't v. Southview Farm,* 34 F.3d 114 (2d Cir.1994), *cert. denied,* 514 U.S. 1082 (U.S. 1995)

Southview Farm, a 2,200 head New York dairy farm (meets the definition of a CAFO), discharged in the nearby stream after over-applying manure to its fields. The jury found that these discharges were not as a result of rain. Related to the agricultural exemption, the court said "We agree that agricultural stormwater run-off has always been considered nonpoint-source pollution exempt from the Act." The 2nd Circuit found that the exemption applies to "any discharges [that] were the result of precipitation." Since the discharge was not the result of rain, it was an illegal discharge.

2. *Fishermen Against Destruction of Env't, Inc. v. Closter Farms, Inc.,* 300 F.3d 1294 (11th Cir. 2002).

Closter Farms, Inc. is a Florida sugar cane farm which leased its land from the state of Florida. As a requirement of the lease, Closter Farms maintained the water drainage system and took the excess water from the irrigation canals to Lake Okeechobee. Evidence established that the sources of the water being pumped into Lake Okeechobee are: (1) rainfall, (2) groundwater withdrawn into the canals from the areas being drained, and (3) seepage from the lake. The court held that "The fact that the stormwater is pumped into Lake Okeechobee rather than flowing naturally into the lake does not remove it from the exemption." "Nothing in the language of the statute indicates that stormwater can only be discharged where it naturally would flow." "...the discharged groundwater and seepage can be characterized as 'return flow from irrigation agriculture." Closter Farms, 300 F.3d at 1297

3. *S. Florida Water Mgmt Dist. v. Miccosukee Tribe of Indians,* 541 U.S. 95 (2004)

The South Florida Water Management District operates a pumping facility that transfers water from a canal into a reservoir a short distance away. The part of the case relevant to the discussion on drainage and irrigation districts involved the pumping of water. The U.S.

Supreme Court held in this case "That definition [of point source] makes plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to "navigable waters," which are, in turn, defined as "the waters of the United States." § 1362(7). The case was remanded to determine if the canal and reservoir were part of one water body or two.

4. *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2nd Cir. 2005)

This case was the first of two challenges to the EPA's present CAFO rules and included many issues other than the agricultural stormwater exemption. As a part of its regulations, the EPA's CAFO rule required nutrient management plans for land application of manure, but exempted the discharge from those lands as an agricultural stormwater discharge. The court upheld EPA's treatment of land application discharges saying:

> "With respect to legislative purpose, we believe it reasonable to conclude that when Congress added the agricultural stormwater exemption to the Clean Water Act, it was affirming the impropriety of imposing, on "any person," liability for agriculture-related discharges triggered not by negligence or malfeasance, but by the weather—even when those discharges came from what would otherwise be point sources. There is no authoritative legislative history to the contrary."

5. *Alt v. EPA*, 979 F. Supp. 2d 701, 715 (N.D. W.V. 2013)

CAFO point sources can still have exempt agricultural stormwater discharges. Eight is Enough is a poultry CAFO located in West Virginia. The issue in the case was whether litter and manure washed from the farmyard to a navigable water by a precipitation event was an agriculture stormwater discharge. The court found that it was not a point source discharge and that it was exempt from the NPDES permit requirement. The point of this case in the context of the recent litigation is that the stormwater discharge doesn't require pure rainwater in order for it to apply.

6. Grasslands Bypass Project (Pending Case with Merits Rulings)

Pac. Coast Fed'n of Fishermen's Ass's v. Murillo, No. 2:11-cv-02980, Order dated Sept 2, 2016 (E.D. Cal. 2016); Pac. Coast Fed'n of Fishermen's Ass's v. Murillo, 2014 WL 1302102; Pac. Coast Fed'n of Fishermen's Ass's v. Glaser, 2013 WL 5230266 (E.D. Cal. 2013); Pac. Coast Fed'n of Fishermen's Ass's v. Glaser, 2012 WL 3778963 (E.D. Cal. 2012).

Irrigation has occurred on farmland in the Grasslands Area of the San Joaquin Valley for more than fifty years. The Grasslands Bypass Project used surface and subsurface drainage to drain the excess water. The subsurface drainage used perforated tiles underlying the farmland to direct water polluted with naturally occurring selenium from the soil through the San Luis Drain and eventually to the Bay-Delta. The key question in the case was whether the discharges violate the Clean Water Act or whether they are exempt as "return flow is from irrigated agriculture."

In its 2014 Order, the district court dismissed allegations of discharges of "contaminated groundwater that pre-dates all farming in the area" and "contaminated groundwater discharged at times, such as the fall and winter months, when little or no irrigation occurs and whose source is not irrigation water" because they "do not amount to a plausible claim that such groundwater, discharged to prevent damage to crops' root zones, is unrelated to crop production" In the 2014 Order, the district court ruled that the exclusion does not apply to the extent of discharge of "retired land that no longer supports irrigated agriculture."

In the most recent ruling, the court opined on the treatment of irrigated versus dryland farming and established the test for determining when the nonag portion of the discharge created a disqualification for the irrigation return flow exclusion. "A focus on the source, while adhering to the rule of narrowly construing the Act's exemptions, would neglect the *raison d'être* of the "return flow" exemption: to level the playing field between farmers relying on irrigation and those who do not. Applying the exemption, therefore, as the court previously determined, requires an inquiry "into whether a majority of the total commingled discharge is in fact related to crop production."(Citing 2014 Order) As a result, several of the claims against portions of the irrigation system were dismissed on summary judgment. The district court in this case will allow some non-agriculture irrigation to flow into the drainage system and still allow it to qualify under the irrigation return flow exclusion.

7. Similar issues in other contexts:

Decker v. Northwest Environmental Defense Center, 133 S.Ct. 1326 (2013);

Oregon and timber companies were sued over stormwater discharges from ditches alongside their logging roads in the state forest. The U.S. Supreme Court held that CWA and its implementing regulations do not require NPDES permits for channeled stormwater runoff from logging roads to be discharged into the navigable waters.

Ecological Rights Foundation v. Pacific Gas and Elec. Co., 713 F.3d 502 (9th Cir. 2013)

Environmental organizations filed an action against utility companies alleging that their utility poles discharged wood preservative when it rained into the environment in violation of the federal Clean Water Act (CWA), and the Resource Conservation and Recovery Act (RCRA). The court affirmed dismissal of the case saying that utility poles were not conveyances, associated with industrial activity or point sources.

Pending Cases without Merits Rulings

1. *Bd. of Water Works Trustees of Des Moines v. Sac County Bd. of Sup. as Trustees of Drainage Districts, et. al.,* No. C 15-4020 (N.D. IA, filed March 16, 2015). Motions for partial summary judgment are pending and a bench trial is scheduled beginning June 26, 2017.

For copies of major documents related to this litigation please see Iowa State University Extension's Center for Agricultural Law and Taxation Website:
https://www.calt.iastate.edu/article/des-moines-water-works-litigation-resources

Background

The Des Moines Water Works raises ten different claims involving nitrate in its raw water source taken from the Raccoon River, including federal Clean Water Act and state tort claims. It is an independent municipal utility who supplies drinking water to the central Iowa area. Its members are appointed by the mayor of the city of Des Moines, but it has separate budgetary and decision making authority. Approximately 40% of its water is sold to customers within the city limits of Des Moines and the remaining 60% is sold outside its city limits, including rural customers. (*See* 2016 DMWW Capital Plan) The service area and population served by the Water Works has grown exponentially over the past 25 years and is expected to continue to grow. The Water Works obtains most of its revenues from charging water usage fees to its retail and wholesale customers.

The ten drainage districts are located approximately 186 river miles Northwest of the Water Works' surface intakes. The newest drainage district was formed in the 1940s, but most were around the early 1900s. The approximately 27,500 acres within the named districts are primarily agricultural and are predominantly utilized in row crop production. The land area of the districts is about 1.2% of the Raccoon River watershed.

Under Iowa Code ch. 468, a drainage district is a local government entity with limited jurisdiction over a small watershed area to construct, repair, and maintain drainage. Drainage districts are recognized and given authority under the Iowa Constitution. Iowa Const. art. I § 18. The county board of supervisors serve as the board of trustees for these districts under Iowa law unless the landowners have gone through a process to privately elect their trustees. Landowners in the district are directly assessed the costs of improvements to the district as special assessments. The districts do not have an annual operating budget or general tax levying authority.

Federal Claims

The first two counts of the petition allege that the districts are illegally discharging nitrates from a point source into navigable waters under the Clean Water Act (CWA) and analogous state statutes. A partial motion for summary judgment on these two counts was filed by the defense on April 1, 2016.

Some of the questions as a result of the summary judgment briefing:

- Are "agricultural stormwater discharges" limited to water that runs off the surface of the ground? Or, does it mean "precipitation related" or "precipitation induced" such that it includes rainwater that's infiltrated the ground?
- Does "stormwater" need to only include pure rainwater or is it expected to pick up "pollutants" along the way and still be exempt stormwater?
- Can agricultural stormwater be collected and channeled and still be exempt? If the districts are required to obtain a permit(s), what specifically is the "point source"?
- Do agricultural drainage systems qualify for the agricultural stormwater discharge exclusion when they primarily drain agricultural land or are they required to obtain an NPDES permit?
- What if the "pollutant" is naturally occurring and such discharge does not violate water quality standards at the point of discharge? As a public policy question, does a permit address the water works' water quality concerns?
- Did Congress intend to treat dryland farming and irrigated farming similarly under the Clean Water Act?

State law claims

The other eight counts include the state law tort claims of public and private nuisance, trespass, negligence, eminent domain, and violations of its due process and equal protection constitutional rights due to immunities afforded the drainage districts under Iowa law. The lawsuit seeks both monetary damages and injunctive relief.

The state claims are the subject of a seldom-used procedure to certified questions of law to the Iowa Supreme Court. A partial motion for summary judgment was filed on September 24, 2015 and federal district court submitted four questions to the Iowa Supreme Court to confirm Iowa law.

In his January 2016 certification, Judge Bennett said "I would have to reject the thoughtful, creative, novel, and well-argued positions of DMWW, **as unsupported by Iowa law and unlikely to be adopted by the Iowa Supreme Court,** if I did not certify these questions." "But, without certification, I would be substituting my judgment of Iowa law in lieu of the seven justices of the Iowa Supreme Court."

Oral arguments were held on September 14, 2016 before the Iowa Supreme Court. Once the Iowa court answers the questions, the federal district court will proceed to reach a ruling on this summary judgment motion.

Certified Questions:

Question 1: As a matter of Iowa law, does the doctrine of implied immunity of drainage districts as applied in cases such as *Fisher v. Dallas County*, 369 N.W.2d 426 (Iowa 1985), grant drainage districts unqualified immunity from all of the damage claims set forth in the Complaint (docket no. 2)?

Question 2: As a matter of Iowa law, does the doctrine of implied immunity grant drainage districts unqualified immunity from equitable remedies and claims, other than mandamus?

Question 3: As a matter of Iowa law, can the plaintiff assert protections afforded by the Iowa Constitution's Inalienable Rights, Due Process, Equal Protection, and Takings Clauses against drainage districts as alleged in the Complaint?

Question 4: As a matter of Iowa law, does the plaintiff have a property interest that may be subject of a claim under the Iowa Constitution's Takings Clause as alleged in the Complaint?

2. *NA KIA'I KAI et. al. v. State of Hawaii Agribusiness Development Corp.,* No. 1:16-cv-00405, Filed 7/25/16.

The Kekaha Sugar Company developed a drainage ditch system in the early 1920s. The Kekaha Sugar Company closed, and the governor issued an executive order transferring management of approximately 12,500 acres of agricultural lands formerly in sugar cultivation to ADC. ADC also assumed management of the drainage ditch system and the sugar company's NPDES permit. ADC renewed the permit in 2007, but withdrew its renewal application for the second renewal. The environmental groups allege that ADC illegally discharged from the drainage system after it withdrew its permit renewal application in violation of the Clean Water Act.

3. Pending Power Plant Cases.

In both of these pending cases involving coal combustion residue and coal ash storage, a motion to dismiss was denied where the plaintiffs allege the plants' NPDES permits were violated from migration of pollutants through groundwater to a surface water. Federal courts are divided on whether the Clean Water Act offers regulatory authority over pollutants migrating through hydrologically connected groundwater to surface water, but federal appellate courts have by and large said that the Clean Water Act does not provide regulatory authority over groundwater.

Sierra Club v. Virginia Electric and Power Company (Dominion), No. 2:15cv112, (E.D.VA Nov. 11 2015)

Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC, No l:14-cv-00753 (M.D.N.C. Oct. 20, 2015)