

Agricultural Environmental Law Update

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Developments from November 2018 through October 2019
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Major Developments Impact Agriculture

A. Clean Water Act

1) Waters of the United States

After the extended litigation reported last year concerning where the issues need to be tried (U.S. Federal District Courts) and the litigation striking down the administration's proposal to add an effective date to the Obama WOTUS rule, this year is marked by the first U.S. District Court opinion on the merits of the challenge to the 2015 WOTUS rules. In Georgia v. Wheeler, No. 2:15-cv-00079 (S.D. Ga. 8/21/19), the court struck down the regulations on both substantive and procedural grounds. Four aspects of the opinion merit extended discussion:

- a) The Role of *Rapanos* in the courts consideration of the substantive merits of the rule and how it does or does not affect the deference accorded the agency under *Chevron*.
- b) The extent to which the rule was inconsistent with Kennedy's opinion in *Rapanos* for failing to satisfy his "significant nexus" standard with regard to interstate waters, tributaries, adjacent wetlands, and case-by-case waters.
- c) The court's conclusion that the rule should be struck down for infringing upon state functions, without taking up either the Commerce Clause claim or the 10th Amendment claim.
- d) The procedural flaws in the rule's promulgation, including the relative coverage of the final rule with the proposed rule and the court's "arbitrary and capricious" conclusion.

2) Indirect Discharges

As reported last year, multiple cases are raising the issue of what sorts of releases of pollutants into the environment are unlawful under the Clean Water Act. Specifically, the courts are struggling with the extent to which the CWA releases of pollutants from point sources into areas

where they will migrate to waters of the United States through groundwater. The U.S. Supreme Court will hear arguments in November in *Maui Co. v. Hawaii Wildlife Fund*, No. 18-260, a case involving injection wells near the Pacific Ocean coast. The current status of these cases and the importance of them for agriculture will be discussed.

B. Endangered Species Act

1) Final Rules - August 2019

In August, the federal government finalized rule changes under the Endangered Species act that make significant changes to the way in which habitat and species are treated by regulators. [84 FR 45020](#) and [84 FR 44753](#) Pending litigation challenging these decisions will be discussed. Four specific changes are worth discussing, including the following:

- a) changing the protections required of threatened species to a case-by-case determination, as opposed to the historical approach of treating them as endangered species.
- b) defining the scope of harms involved in threat assessments to provide more discretion to disregard less foreseeable future harms. Many argue that this provides a way for regulators to disregard some harms that climate change is predicted to cause.
- c) changing the assessment methodology for critical habitat by requiring that currently occupied lands be evaluated before uninhabited lands are considered.
- d) expanding the scope of evidence available for listing decisions to include non-scientific economic loss data.