

2nd Annual Mid-South Agricultural & Environmental Law Conference

Thanks to our sponsors!



The Mississippi Bar Association Section on Natural Resources, Environment & Energy (SONREEL)

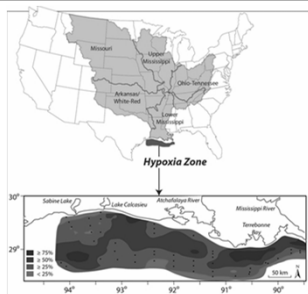
Water Quality Trading 101



Nutrient Reduction at Lower Cost

Image courtesy of Electric Power Research Institute

Trading in the Mississippi Basin

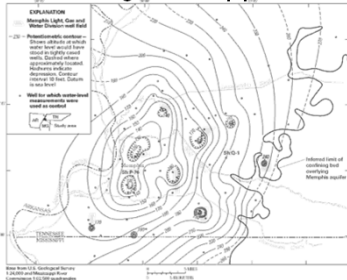


What's Missing in the Basin?

- Legal Framework:
 - A few states in the Basin have implemented pilot programs or enacted legislation.
 - Most recently Arkansas passed House Bill 1067 in 2015 session authorizing water quality trading program.
- Numeric Nutrient Criteria & TMDLs
 - A few basin states (Wisconsin, Minnesota, Missouri, Illinois) have some numeric criteria for nutrients. Efforts are underway in others (Mississippi).
- Environmental Groups Pushing for Federal Standards
 - 2008 rulemaking petition was denied.
 - 2012: Lawsuit challenging EPA's denial for the petition.
 - District Court in September 2012 ruled that EPA was required to make a necessity determination.
 - 5th Circuit vacated that decision on April 7, 2015.

Mississippi v. Tennessee

Is Memphis Stealing Mississippi's Water?



Open Questions

- Is Memphis Sands Aquifer an interstate water resource subject to equitable apportionment?
 - U.S. Supreme Court has never applied doctrine to groundwater.
- If not, will Mississippi revive litigation against Memphis? Can states negotiate a settlement, i.e. compact?

WOTUS Proposed Definition

- Waters of the U.S. would include:
 - ▣ Traditionally navigable waters;
 - ▣ Interstate waters;
 - ▣ Territorial Seas;
 - ▣ Impoundments of water;
 - ▣ Tributaries of any of the above waters;
 - ▣ Other waters, on a case-by-case basis, with a significant nexus to one of the above.

What waters wouldn't be WOTUS?

- Waste Treatment Systems
- Prior Converted Cropland
- "Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow."
- "Ditches that do not contribute flow, either directly or through another water, to a [WOTUS]."
- Misc. other waters, such as artificial ponds, gullies, depressions.

Proposed Definition of Tributary

- "... water physically characterized by the presence of a bed and banks and ordinary high water mark ... which contributes flow, either directly or through another water, to a [WOTUS]. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, to a [WOTUS]."
- Breaks along a water course, such as bridges, culverts, pipes, wetlands, underground channel, would not cause a water to lose its status as a tributary.

Significant Nexus

- "The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region ..., significantly affects the chemical, physical, or biological integrity of a [traditionally navigable water, interstate water, or territorial sea]. For an effect to be significant, it must be more than speculative or insubstantial."

Current Status

- EPA submitted final rule to OMB for review on April 6.
- Regulatory Integrity Protection Act of 2015 (H.R. 1732) introduced in House would require the federal agencies to withdraw the WOTUS rule within 30 days.

RECENT CASE LAW

Community Association for Restoration of the Environment v. Cow Palace, LLC

- Case between environmental groups and 4 farms
- Jan. 14th Ruling on Motions (111 pages long and in your materials)
- First case to hold that improperly handled manure from a CAFO is a solid waste

Community Association for Restoration of the Environment v. Cow Palace, LLC

- 3 issues under RCRA analysis
 1. Over-application was considered discarded waste under RCRA
 1. Nutrient Mgmt plan required testing. CP used the estimate found in the plan and applied to bare soil
 2. Lagoons were leaking
 1. No documentation that all lagoons were constructed to NRCS standards
 2. Evidence of leaking
 3. Composting solid manure on unlined ground and the pens themselves allow seepage

Des Moines Water Works v. Sac County et al.

- Background - nitrates
- Cause of Action: CWA, SDWA, tort
- Implications
 - 2 major exemptions for agriculture are stormwater discharges and return flows from irrigation
- Novel Approach in suing the Drainage Districts
 - This case will probably be around for a long time.

AGRICULTURAL LAW UPDATE

Current Federal Policy

"Statement of Policy: Foods Derived from New Plant Varieties" (1992)

- Does not establish special labeling requirements for bioengineered foods as a class of foods.
- The policy states that FDA has no basis for concluding that bioengineered foods differ from other foods in any meaningful or uniform way, or that, as a class, foods developed by the new techniques present any different or greater safety concern than foods developed by traditional plant breeding.

(c)

State Labeling of Biotechnology

Connecticut

- Passed in summer of 2013, but has a complicated triggering provision that requires other states to pass similar laws before going into effect

Maine

- Passed in January of 2014 with a triggering provision similar to CT

Vermont

- Act 120 was passed by the Vermont legislature in May of 2014
- Genetically engineered food sold in Vermont will need to be labeled starting July 1st 2016 (no triggering provision this time)
- It included a provision to pay for the lawsuit that would result...Lawsuit has already been filed
 - GMA v. Sorrell, Docket No. 5:14-CV-117

Oregon and Colorado had ballot initiatives that failed in the November 2014 election

(c)

Proposed Federal Bills

- Genetically Engineered Food Right-to-Know Act (H.R. 913)
 - Reintroduced in February and is in committee
 - GovTrack gives it a 0% chance of passage
- Safe and Accurate Food Labeling Act of 2015 (H.R. 1599)
 - Reintroduced in March & would preempt state labeling laws
 - GovTrack gives it a 2% chance of passage

Proposed Rule

- February 23rd – FAA published proposed rule for small UAS (195 pages)
- Available at <https://www.faa.gov/uas/nprm/>
 - 60 day comment period, but likely will be extended
 - VLOS, under 500 ft, daylight operations, no observer, under 55 lbs, certify the “operator” and vetted by TSA

Other UAV issue

Proposed rule has one basic goal: Safety of US airspace

Privacy:

- Major concern not addressed by FAA
- #1 question of landowners I’ve talked to is “Can I shoot them down?”
- Up to the states to regulate this issue

Privacy

- Many of the proposed (and passed) state laws focus on privacy
- Typically work to make the capture of images with a UAS a crime under certain circumstances



State UAS Laws and Privacy

According to the National Conference of State Legislatures in 2013:

- 43 states introduced 130 bills and resolutions addressing UAS issues.
- At the end of the year, 13 states had enacted 16 new laws; and
- 11 states had adopted 16 resolutions
 - Available at <http://www.ncsl.org/research/civil-and-criminal-justice/unmanned-aerial-vehicles.aspx>

Ex: Tex. Gov’t Code Ann. art. 4, §423

Effective: Sept 1, 2013

- A person commits an offense if the person uses an unmanned aircraft to capture an image of an individual or privately owned real property in this state with the intent to conduct surveillance on the individual or property.

Idaho Law Enforcement / Ag Gag

- Idaho Code Ann. § 21-213 – Absent a warrant it is illegal to conduct surveillance on:
 - (ii) A farm, dairy, ranch or other agricultural industry without the written consent of the owner of such farm, dairy, ranch or other agricultural industry.

Grain Dealer Laws: Turner Grain

- August 2014: first public reports emerged
- August 22: Legislative hearing held to open discussion about TG issues
 - Resolution approved to extend CCC loan repayment
 - Testimony was that losses could be \$20 - \$50 million
 - Ark. AAD Secretary indicated he thought U.S. Attorney could become involved in the future
 - Preliminary discussions of possible legislative options, including licensing, were discussed
- Chapter 12, Chapter 11, and several other lawsuits filed and continue through today

States' Dealer & Warehouse Laws

- NALC research shows:
 - 35 states regulate "grain dealers" in some manner
 - 30 states regulate "grain warehouses" (also federal option under the U.S. Warehouse Act, overseen by USDA FSA)

States' Dealer & Warehouse Laws

- Common Provisions:
 - Licensing (D = 31 states, W = 29 states)
 - Bonding (D = 30, W = 26)
 - Auditing (D = 31, W = 28)
 - Prompt Payment (D = 13, W = 10)
 - Indemnity Fund (D = 11, W = 13)
 - Failure/Liquidation (D = 11, W = 19)
 - Penalties (D = 31, W = 29)

Industrial Hemp

- Hemp (a/k/a "industrial hemp") vs. Marijuana
 - *Cannabis sativa*
 - Delta-9 tetrahydrocannabinol (THC)
- IH legally produced in approx. 30 countries
 - Fiber, seed, or dual purpose
 - About 200,000 acres globally, China largest producer

Industrial Hemp

- Controlled Substances Act of 1970 (CSA)
 - Does NOT make growing hemp illegal
 - DOES make illegal growing hemp without permit from Drug Enforcement Agency
- CSA does not differentiate between varieties of *Cannabis sativa* that are low vs. high in THC
- State-issued license/permit does not change this reality

Industrial Hemp: 2014 Farm Bill

- Section 7606 reads, in part:

Notwithstanding the Controlled Substances Act . . . or any other Federal law, an institution of higher education . . . or a State Department of Agriculture may grow or cultivate industrial hemp if: . . .

Industrial Hemp: 2014 Farm Bill

- (1) the IH is grown or cultivated for purposes of research conducted under an **agricultural pilot program** or other agricultural or academic research; and
- (2) the growing or cultivating of IH is allowed under the laws of the State in which such institution of higher education or State department of agriculture is located and such research occurs.

“Agricultural pilot program” = pilot program to **study** the growth, cultivation, or marketing of IH in a manner that:

- ensures that **only** institutions of higher education and State departments of agriculture are used to grow or cultivate IH;
- requires that sites used for growing or cultivating IH in a State be certified by, and registered with, the State department of agriculture; and
- authorizes State departments of agriculture to promulgate regulations to carry out the pilot program in the States

- “Industrial hemp” means the plant *Cannabis sativa L.* and any part of such plant, whether growing or not, with a delta-9 tetrahydrocannabinol H. R. 2642—265 concentration of not more than 0.3 percent on a dry weight basis.

- Approaching 20 states have laws in place that fall within 2014 Farm Bill language
 - 1990’s through recent past
- Common provisions, include but not limited to:
 - Excludes IH from state law definition of “controlled substances”
 - Requires licensing with state
 - IH defined based on percentage of THC (.3% or less)
- Others have passed resolutions calling for more study, created commissions
- Many others have proposed laws