



# **Top Ten of 2020: Legal Issues Affecting Agriculture**

*Harrison Pittman, Director* • *Brigit Rollins, Staff Attorney*

# Environmental Developments in 2020

Navigable Waters Protection Rule

*Cty. of Maui* case

NEPA Regulations

Dicamba

Pesticide-Related Litigation



# Background:

- Defines “waters of the United States” under the CWA
- Only “waters of the United States” are under CWA jurisdiction
- Replaces the 2015 WOTUS rule
  - Was only legally valid in 22 states



# What's in the Navigable Waters Rule?

- What is a WOTUS:

- Territorial seas and traditional navigable waters
- Perennial and intermittent tributaries of such waters
- Certain lakes, ponds, and impoundments of jurisdictional waters
- Wetlands adjacent to other jurisdictional waters

- What is **not** a WOTUS:

- Twelve specific categories of water not including under WOTUS
- All groundwater
- Surface water that flows only as a result of precipitation
- Most farm and roadside ditches
- Artificial lakes and ponds
- Variety of constructed water features



# What Has the Response Been? ... Lawsuits!

- Coalition of states led by CA filed suit arguing that the rule is too narrow, does not meet *Rapanos* “significant nexus” test
- Two environmental groups have filed suit also claiming that the rule is too narrow
- Lawsuits from the New Mexico Cattle Growers Association, Oregon Cattlemen’s Association, and Washington Cattlemen’s Association argue that EPA was too broad in its definition of navigable waters
- Court issued an injunction against the Navigable Waters Rule in Colorado
  - Only applies to the Army Corps of Engineers.
  - EPA can continue operating under the rule
- For more information on WOTUS updates in 2020, [click here](#)



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# Background:



- County of Maui operates four wells at the Lahania Wastewater Reclamation Facility
- Wells pumped wastewater into groundwater
  - Wastewater entered the Pacific Ocean through the groundwater half a mile from the facility
- Plaintiffs brought suit arguing CWA violations
- Ninth Circuit concluded groundwater had served as conduit and was no different than direct discharge



# Before the Supreme Court

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- County of Maui argued that CWA only applied when pollutants entered a WOTUS directly from a point source
- Plaintiffs argued that S.C. should uphold Ninth Circuit “fairly traceable” conclusion
- S.C. declined to take either approach
- **Conclusion:** CWA requires a permit when there is a direct discharge of a point source into navigable waters or when there is the “functional equivalent of a direct discharge”
  - For a closer look at the decision, [click here](#)



# What is a “Functional Equivalent of a Direct Discharge”?

- S.C. listed a variety of factors:
  - Transit time
  - Distance traveled
  - Nature of the nonpoint source material
  - Extent to which pollutant becomes diluted
  - Amount of pollutant to reach WOTUS
- Time and distance very important
- Wastewater from County of Maui travelled ~ 1/2 mile to reach the Pacific



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# Background:

- CEQ proposed NEPA regulatory overhaul in January
- First regulatory overhaul since NEPA was enacted in 1970
- Became effective September, 14



# What's in the NEPA Regulations?

- Exclude from NEPA review:
  - Projects that are only “minimally federally funded”
  - Projects agencies have a non-discretionary duty to carry out
  - Projects where NEPA compliance would conflict with requirements for another statute
- Only consider “reasonably foreseeable” environmental effects during NEPA process
- Establish page limits for NEPA documents:
  - 75 pages for an EA
  - 150 pages for an EIS
  - 300 pages for an EIS of unusual complexity
- One year limit to prepare an EA
- Two year limit to prepare an EIS
- To see more about the new regs, [click here](#)



# How Does That Impact Agriculture?

- Regulations identify specific agency actions that are not “major federal actions” requiring NEPA review
- Major federal actions “do not include farm ownership and operating loan guarantees by the Farm Service Agency [...] and business loan guarantees by the Small Business Administration.”
- Recipients of these loans no longer have to wait for NEPA process to be completed before receiving loan
  - No longer at risk of NEPA lawsuits
  - For a closer look at this portion of the regulations, [click here](#)



# What Has the Response Been?

- Coalition of environmental groups filed a lawsuit challenging the new regs
  - *Envtl. Justice Health All. v. Council on Envntl. Quality*, No. 1:20-cv-06143 (S.D. N.Y. Aug. 6, 2020)
- Plaintiffs claim that the new regs would harm “people, communities and the natural environment”
- Argue that eliminating the requirement for agencies to consider “cumulative” and “indirect” effects of their actions violates NEPA
- Case is on-going



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# *Bader Farms Case*

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- In February, jury ruled in favor of Bader Farms in their case against Monsanto
- Awarded Bader Farms \$15 million in actual damages and \$250 million in punitive damages
- Found in favor of Bader Farms on all counts, including:
  - Negligent design/failure to warn
  - Civil conspiracy
  - Joint Venture
- [The Deal With Dicamba](#) series goes in-depth



# Ninth Circuit Case

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- Ninth Circuit vacated dicamba registration in June
  - Plaintiffs' second attempt to vacate registration
- Case brought under FIFRA and ESA
- Court concluded the registration was invalid under FIFRA
  - EPA wrongly concluded that label amendments would not significantly increase adverse effects to the environment
- EPA substantially understated three risks and failed to consider three others, including economic and social costs
- Timing of decision prompted EPA to release guidance on dicamba application for remainder of growing season



# 2021-2025 Registration

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- Announced in October
- Registers three dicamba pesticides from 2021 – 2025
- Label changes include:
  - National application cutoff date of June 30 for soybeans and July 30 for cotton
  - Downwind buffer of 240 feet, and 310 feet in areas where ESA-listed species are located
  - Requirement for pH-buffering agency to be tank-mixed with dicamba products to help control volatility
- American Soybean Association has filed a lawsuit challenging cutoff dates and buffer requirements



# FIFRA Policy Change

- Memorandum accompanying dicamba registration contains a footnote altering EPA policy on FIFRA section 24(c) permits
  - AKA “special local needs” permits
  - Allow states to alter use requirements for federally registered pesticides
  - Typically used to broaden pesticide use, states have used it to implement application cutoff dates for dicamba
- EPA will no longer let states use 24(c) permits to restrict use beyond federal label, applies to all pesticides
- States may still regulate use under FIFRA section 24(a) or state rulemaking procedures
- Unclear what effect of this policy change will be



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# Other Pesticide-related Activity:

- Glyphosate
- Enlist Duo
- Chlorpyrifos



# Glyphosate in 2020:

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- Bayer still in settlement negotiations over multiple Roundup-related lawsuits
- [Federal district court concluded](#) that requiring glyphosate products to bear Proposition 65 labels was a First Amendment violation
- EPA issued an Interim Registration Review Decision for glyphosate in January
  - Reapproving glyphosate for use, reaffirming EPA view that glyphosate does not cause cancer
  - [Two petitions for review](#) of this decision filed in the Ninth Circuit



# Enlist Duo in 2020:

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- Ninth Circuit upheld registration for Enlist Duo
- Case challenged the 2017 registration under both FIFRA and the ESA
  - Court rejected every FIFRA claim except for claim that EPA failed to properly assess harm to the monarch butterfly
  - Court disagreed with plaintiffs that EPA violated its duty to use “best scientific and commercial data available” by using FIFRA methodology to reach ESA “no effect” conclusion
- Registration sent back to EPA for further analysis on monarch butterfly, kept registration in place



# Chlorpyrifos in 2020:

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- [Two cases recently filed in California against Corteva](#) allege that exposure to chlorpyrifos harmed plaintiffs' children
- Claims include:
  - Negligence
  - Failure to warn
  - Design Defect
- Claims also brought against city where families reside alleging that the city failed to provide “wholesome, potable” drinking water
- More cases are expected to follow



# Other Developments

*2020*



# 2020 Elections: Key Highlights

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- Upcoming webinar: <https://bit.ly/37Pn8vC>
- U.S. House Agriculture Committee
  - Rep. Collin Peterson (D-MN) defeated
  - David Scott (D-GA) vs. Jim Costa (D-CA)
  - Austin Scott (R-GA), Glenn Thompson (R-PA), Rick Crawford (R-AR)
- U.S. Senate Agriculture Committee
  - Senator John Boozman
- Secretary of Agriculture
  - Rep. Marcia Fudge (D-OH), Rep. Collin Peterson, Senator Heidi Heitkamp



# Hemp: Getting (Back) on Track?

- 2014 Farm Bill – Window is opened
- 2018 Farm Bill – Door is opened, but considerable uncertainty (overlapped with decline in CBD market)
- October 2019 – USDA issues final rule
  - .3% level THC
  - Testing labs
  - FDA treatment of CBD
- February 2020 – USDA & DEA issues enforcement discretion delaying key aspects of final rule
  - DEA-registered testing labs
  - Disposal of hemp crop
- 2021 Appropriations process – very important



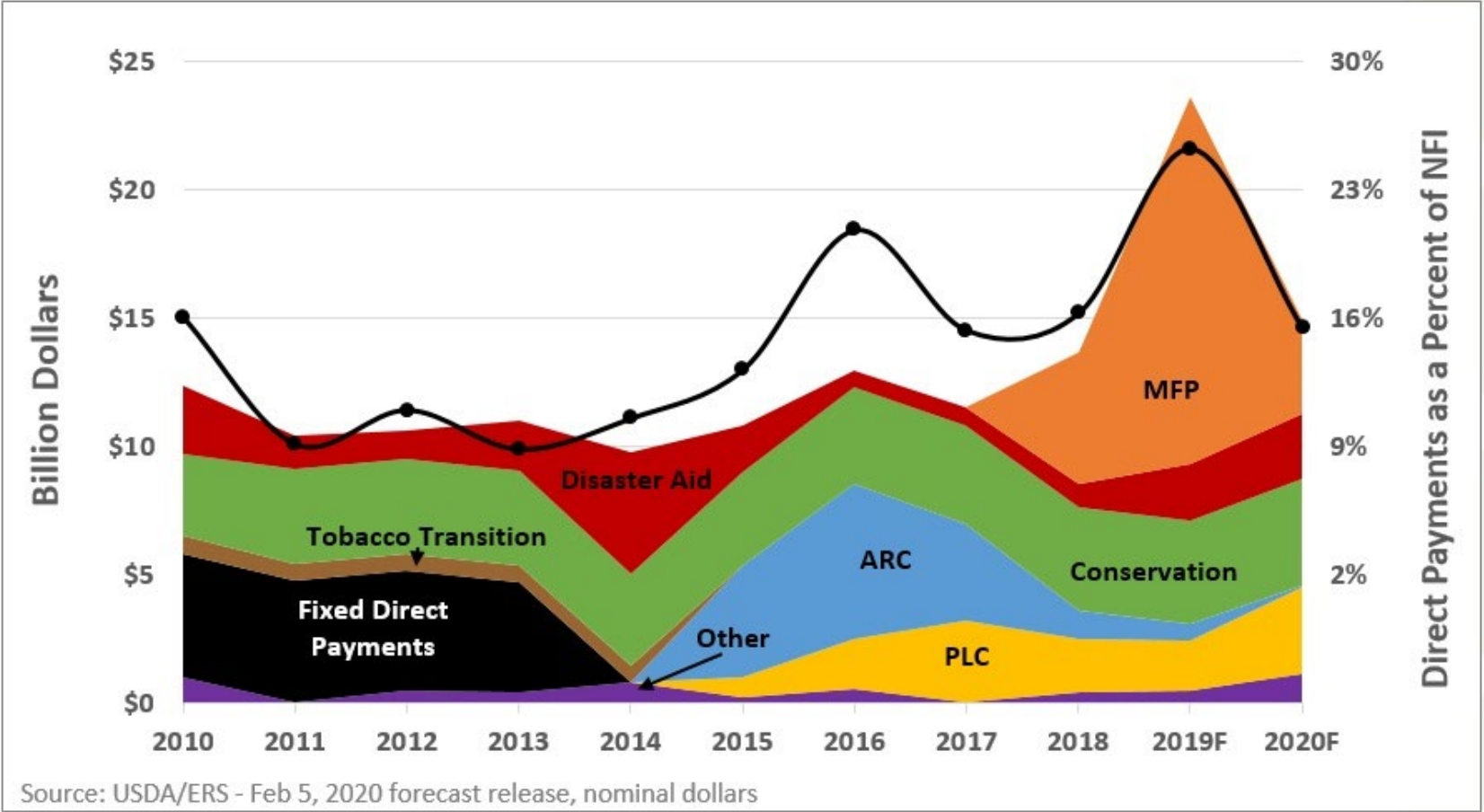
# FY2021 Appropriations Subcommittee

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- 2019 Final Rule “. . . creates roadblocks for farmers by requiring an unrealistic timeframe for testing, the use of Drug Enforcement Administration registered laboratories, the conversion of THCA into THC, a sampling of only flowering tops, and an arbitrary negligence threshold of 0.5 percent.”
- Also directs FDA to take action on how it will enforce federal law regarding CBD products



# COVID & Ag: Key Highlights



# Federal Legislation: Enacted

Big Picture: What COVID-19 legislation has already been **enacted**?

- Coronavirus Preparedness and Response Supplemental Appropriations Act of 2020
  - H.R. 6074; **March 4**
- Families First Coronavirus Response Act
  - H.R. 6201; **March 18**
- Coronavirus Aid, Relief, and Economic Security Act (CARES Act)
  - H.R. 748; **March 27**
- Paycheck Protection Program and Health Enhancement Act
  - H.R. 266; **April 24**
- Paycheck Protection Program Flexibility Act of 2020
  - H.R. 7010; **June 5**



# Proposed: Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act (H.R. 6800)

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- Passed the House on May 15, by a 208 to 199 margin
- \$3 trillion and 1,800+ pages long
- Contains many ag-related provisions, but notably does not include increased borrowing authority for the Commodity Credit Corporation
- Wrangling between House, Senate, and White House continues (or not)



# COVID & Ag: Key Highlights/Resources

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- *Meat Processing Laws in the United States: A State Compilation* ([here](#))
- Webinar: *Slaughter and Processing in the United States: Oversight and Requirements* ([here](#))
- Webinar: *COVID-19, Agriculture, & the Law: Taking Stock of the Road Behind and Ahead* ([here](#))
- *COVID-19 Resource Library* ([here](#))



# Ag Trade: Key Highlights

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- Phase I trade deal with China
- Rice shipments to China
- On the horizon: What will election outcomes mean for ag trade?



# “Checkoff” Litigation

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- *R-CALF v. USDA*
  - On appeal to 9<sup>th</sup> Circuit
  - New litigation filed in District Court for the District of Columbia
- Central issue: Government speech doctrine
- Could lead to a USSC consideration of “government speech” doctrine in context of the national beef checkoff
- Overall trend appears to be less control of checkoff dollars at state level
- Center publications on checkoff programs ([here](#))





## Contact us

(479) 575-7646

[nataglaw@uark.edu](mailto:nataglaw@uark.edu)

[www.nationalaglawcenter.org](http://www.nationalaglawcenter.org)



@nataglaw