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Connor Pace

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The Clean Water Act and the Scope of Federal Power

**UNIVERSITY OF DENVER WATER LAW REVIEW ANNUAL
SYMPOSIUM 2017: AT THE CONFLUENCE: THE PAST, PRESENT,
AND FUTURE OF WATER LAW**

Denver, Colorado

April 7, 2017

THE CLEAN WATER ACT AND THE SCOPE OF FEDERAL POWER

For this panel discussion, David Ivester, Melinda Kassen, Peter Nichols, and Paul Kibel each spoke about a different aspect of the Clean Water Act (“CWA”) and its various intersections with federal power.

First, David Ivester, partner at a land use, environmental, and water law firm *Briscoe Ivester & Bazel*, detailed the background of the CWA and the two different types of jurisdiction contained within it. Simply put, the CWA regulates discharges of pollutants from point sources into navigable waters. Under the relevant definitions, pollutants include dredge or fill material and navigable waters are simply “waters of the United States.” The CWA governs two types of jurisdictions: geographic and activity. Geographic jurisdiction allows the CWA to protect all waters with a “significant nexus” to traditionally navigable waters. This theory derived from three Supreme Court opinions interpreting the CWA. First, in *United States v. Riverside Bayview Homes*, the Court upheld the Army Corps of Engineer’s claim that the CWA’s geographic reach includes wetlands adjacent to navigable waters. Then, in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers* (“*SWANCC*”), the Court found that Congress did not intend the CWA to reach isolated, non-navigable, intrastate waters. Finally, the Court in *Ripanos v. United States* issued a plurality opinion holding that the CWA extends only to relatively permanent, standing, or continuously flowing bodies of water and those wetlands attached to such bodies of water. Interestingly enough, Kennedy’s concurring opinion in *SWANCC* used a significant nexus as a test for determining CWA jurisdiction.

Mr. Ivester then discussed activity jurisdiction of the CWA, specifically in reference to plowing. An Army Corps of Engineers regulation excludes plowing as a discharge. Mr. Ivester then pointed out that, while the regulation defines and excludes plowing, it does not include redistribution of soil that changes any water to dry land. Finally, Mr. Ivester showed a picture of a freshly-tilled land asked the audience to consider whether plowing had occurred.

Next, Melinda Kassen, Interim Director of the Theodore Roosevelt Conservation Partnership’s Center for Water Resources, explained the CWA’s statutory and regulatory landscape, specifically focusing on the “waters of the United States” rule. First, Ms. Kassen discussed various health and safety issues with rivers prior to the CWA. For instance, rivers were burning and life within them was dying. Even following the Water Quality Act of 1965, these same issues persisted. As a result, Congress passed the CWA in 1972. From around the 1970’s until 2006, the CWA utilized a definition of the “waters of the United States” that included all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, and streams.

Moreover, a series of opinions – elaborated in depth by Mr. Ivester – examined this definition, and Ms. Kassen pointed out interesting parts of two of the opinions. For instance, in *SWANCC*, the court held that waters need not literally be navigable, yet it also said that all words must have meaning. Moreover, in *Rapanos*, the Court required a significant nexus to navigable waters alone or in combination with similarly situated navigable waters. In this opinion, the Chief Justice himself mentioned that the best way to deal with the continuous stream of navigable water issues was to adopt rules. Finally, in 2015, the agencies adopted a rule defining the waters of the United States using connectivity and bright line theories. For connectivity, the rule required some form of nexus to a river, stream or body of water. The rule also introduced what Ms. Kassen referred to as “bright lines.” That is, the rule dictates that waters within a given distance of navigable waters are automatically within the definition. Many states objected to this rule and filed suit. The Sixth Circuit consolidated all of the cases and as recently as January 20, 2017, the parties filed the opening briefs in the case. Moreover, President Trump issued an Executive Order in February 2017 regarding the waters of the United States rule.

Finally, Ms. Kassen closed by asking the audience to consider who will implement the next version of the CWA. Originally based on cooperative federalism, the CWA did not maintain that mantra for long, especially in the expensive permitting process. For example, only two states currently issue their own 404 permits. Simply put, states are forced to do more in carrying out the CWA, but those states lack sufficient funding to provide the necessary services. As a result, CWA enforcement drops and a downward spiral may continue.

Peter Nichols, Board Member of University of Colorado Law School’s Getches-Wilkinson Center for Natural Resources, spoke third, and he discussed the intersection of water quality and water quantity. Specifically, he discussed physical water transfers and question of whether these transfers that do not add anything else to the destination body require permitting under Section 402 of the CWA. First, Mr. Nichols noted that, for most transfers, the destination body sees no impact. However, other transfers can exceed or contribute to exceeding current water standards by introducing more suspended solids such as nutrients and metals. Moreover, the National Pollutant Discharge Elimination System (“NPDES”) permitting include discharge limits that concern primarily with contamination. Thus, water transfers must meet NPDES compliance standards and often involve a water treatment plant.

At this junction, Mr. Nichols pointed out that compliance with NPDES standards for water transfers is difficult for three reasons. First, permitting, treating, and transferring are expensive practices, making the process almost economically infeasible. Second, the transfers must operate among a range of differences in water volume and water quality, presenting a technical challenge to transfers. Finally, transfer sites are limited and environmentally difficult to operate. Faced with these challenges, a transferor only has two options. On one hand, it could cease waters when transfers do not meet the standards. This presents a problem, as stopping during a critical time may result in a chronic lack of water for the season. On the other hand, the transferor may continue transferring water and take the fines. Regardless, high NPDES standards lead to a significant reduction in water transfers and net loss of water supplies.

Mr. Nichols noted that this issue has occupied water transfers from the

1970's through today. For example, the EPA's water transfers rule in 2008 exempted certain water transfers from NPDES permitting requirements. Parties challenged the rule, and the Eleventh Circuit consolidated all of the cases, only to dismiss them for lack of jurisdiction. The claim reappeared in the Southern District of New York, which vacated the order. However, varying rulings still persist. Even this year, the Second Circuit held that water transfers do not require NPDES permits. Finally, Mr. Nichols laid out the bottom line of his presentation: that Western residents rely on water transfers daily. In many cases, these transfers are economically, technically, and environmentally impossible to meet. The critical issue here arises from concerns about traditional federal deference to the state water law.

The fourth and final panelist, Paul Kibel, professor of environmental, natural resource, and water law at Golden Gate University School of Law, detailed how the state of California is protecting instream flows. Mr. Kibel. First, he explained that fisheries are facing decline in California. Traditionally, the state has a robust commercial fishery industry with salmon stocks playing an important role in the economy. Moreover, federal laws and agency work has usually kept water in streams for fisheries. However, these fisheries face a future with uncertainty concerning continued support.

After laying out the problem, Mr. Kibel explained three major impacts of reduced instream flows on fisheries. First, the reduction in instream flow results in seawater intrusion into rivers, raising their salinity. Moreover, as the freshwater supply meeting the oceans decreases, the intrusion increases, pushing salt water further and further up the deltas. Increased saline levels in the water can even affect the fish. For instance, the Delta smelt lives well in brackish waters, but it dies in saline waters. Second, reduced instream flow results in increased water temperature. Without much water coming downstream, the rivers warm and, in some cases, decimate fish populations. Third, reduced instream flows result in slack water conditions. Then, these slowly flowing waters grow algae and parasites, which can harm the fish.

Next, Mr. Kibel gave examples of federal laws playing a big role in keeping instream water flows steady then explained how California has safeguards if the water rushes out. First and foremost, the Clean Water Act compels the EPA to review state water quality standards. Moreover, states also have the power to propose beneficial uses to the EPA for approval. Pursuant to this authority, the California State Water Board is updating its water plan to establish base instream flows for tributaries of the San Joaquin River. Next, Section 7 of the Endangered Species Act requires drafting biological opinions during consultation. Additionally, courts have upheld these biological opinions supporting instream flows for salinity and temperature concerns. Third, the *Winters* Doctrine allows tribes to hold federal water rights to fulfill the purposes for which reservations are created. This authority includes rights to instream water for supporting salmon stocks. Next, the National Environmental Policy Act compels creating Environmental Impact Statements, and Kibel pointed to the California Water Fix as a situation where an EIS protected water and salmon. Finally, Section 10 of the Federal Power Act requires non-federal dam permits to protect fish spawning.

What happens, Mr. Kibel posited to the audience, when these federal powers no longer support instream flows in California? Luckily, California has its

own protections in place. For instance, California's state Clean Water Act requires appropriation similar to the federal statute. Similar to the court-supported federal ESA, California courts have also held that state agencies have the authority to protect instream water for public services. As a response to the *Winters* Doctrine, both the California Constitution and its Water Code operate under a reasonable use law. Under this scheme, unreasonable methods of diversion are unlawful, which protects instream flows from improper diversion. Where biological opinions may not be available, the California Fish and Game Code requires dam operators to release enough water to maintain downstream fishers. Even better, this provision applies to federal dams within the state. Finally, Section 401 of the CWA requires the federal government to obtain water quality certification from the states for certain activities. While the state is considering the effect of a project on its waters, it may impose instream requirements on those water quality certifications to protect them.

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**EVOLVING WATER LAW AND MANAGEMENT IN THE UNITED STATES:
DELAWARE, KANSAS, MONTANA, AND INTERSTATE LITIGATION**

Professor John Peck of the University of Kansas School of Law introduced the second panel of the 2017 Water Law Review Symposium entitled "Evolving Water Law and Management in the United States: Delaware, Kansas, Montana, and Interstate Litigation." Professor Peck chose these states because they represent a cross-section of the United States. He highlighted the major differences in rainfall between the states and explained that these states differ in the way they use groundwater and the rights applied to it.

Professor James May of the Widener University Delaware School of Law presented first regarding Delaware, which was the first state in the country to have water law. Delaware applies riparian water rights, which is mostly derived from the state's common law.

Water use greatly affects the abundant wildlife in Delaware's waters. The Delaware Bay Estuary is habitat for many water-dependent species, including migratory birds, marine turtles, horseshoe crabs, and twenty threatened or endangered species. Delaware has a high extinction rate—second only to Hawaii.

Furthermore, since the Swedes landed in Delaware in 1658 and first established water laws, water rights have been an important part of industrial development. Water law established through common law focused primarily on mill owners' rights until the late Nineteenth Century.

Administrative agencies also manage Delaware's water resources. The Department of Natural Resources and Environmental Control (the "DNREC") is responsible for regulating water in Delaware and enforcing the Delaware Coastal Zone Act. The legislature passed the Act in 1971 to prohibit new heavy industry, bulk transfer facilities, and other non-conforming uses.