

Water: There's a need for 'bright line jurisdiction'

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"It creates a lot of uncertainty on the ground," she said.

Technically, "prior converted cropland" that was cultivated before the Clean Water Act's 1972 enactment cannot be regulated as a wetland.

In practice, though, the federal government has still required Clean Water Act permits for changes in agricultural crops and practices, Schiff said.

For example, the Pacific Legal Foundation has represented farms that tried switching from pastures to row crops or nut orchards, only to find out they're subject to permitting regulations, he said.

The federal government is con-

cerned about tillage of "vernal pools" that are dry most of the time but are still considered wetlands with a significant connection to a navigable waterway, Schiff said.

There's a need for "bright line jurisdiction" over which wetlands are regulated, since the exemptions for farmers are so complex, Briggs said.

"Unfortunately these exclusions are very convoluted," she said. "A farmer doesn't have the certainty about whether it applies to them or not."

In the lawsuit the Supreme Court decided to review on Jan. 24, Idaho landowners Michael and Chantell Sackett are challenging a finding that they need a Clean Water Act permit to build a house on their property. The federal government considers the par-

cel a regulated wetland, even though a road separates it from a nearby waterway.

The facts of the case make it an "excellent vehicle" to resolve uncertainties that have persisted since the highest court's last Clean Water Act decision in 2006, known as Rapanos, according to the Pacific Legal Foundation.

"It's been a dispute not just for the Sacketts but a broader legal dispute for a long time," Schiff said.

In the 15 years since Rapanos, appellate courts haven't been able to agree on how to apply the legal precedent, the PLF said in its petition to the Supreme Court. Meanwhile, federal agencies have repeatedly changed their interpretation of the case law.

In that time, Congress hasn't

attempted revising the Clean Water Act itself to dispel the uncertainty, he said. "The only government actor that can fix the problem is the court."

The different composition of the Supreme Court gives hope that the Sackett case will create a legal precedent with a clear test for which wetlands are regulated, Schiff said.

Three justices confirmed during the Trump administration — Neil Gorsuch, Brett Kavanaugh and Amy Coney Barrett — are solid "textualists" who are likely to interpret the Clean Water Act as having a limited scope, he said.

As a practical matter, the Supreme Court's willingness to review the case signals that the justices expect to achieve a majority opinion on the issue, Schiff said.

That's important because the Rapanos case produced a "split decision" lacking a majority opinion, which has complicated the legal interpretation of wetlands jurisdiction in thorny circumstances, he said.

"It really couldn't come up with a single test to cover those cases," he said.

The U.S. Environmental Protection Agency urged the highest court against taking the Sackett case, arguing that the review would be premature.

Federal agencies are currently considering a new interpretation of the "waters of the U.S." definition that draws on "the best available scientific evidence" and several decades of regulatory experience, the EPA said.

Marijuana: 'The water trucking business has gone bonkers'

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How we got here

Eight years ago, Oregon voters passed a ballot measure legalizing recreational marijuana use and its cultivation and sale.

Hemp and marijuana — related cannabis plants — may be grown legally in Oregon by farmers as long as they register with the state Department of Agriculture and other agencies. Growers must pay fees and follow specific rules.

But, as the state quickly discovered, not everyone plays by the rules — especially when it comes to a crop like marijuana, which is far more profitable to grow without a license and sell out-of-state.

Since 2015, the state has been swamped by thousands of unlicensed operations, many of which are run by people claiming to be legal hemp farmers.

Illegal marijuana, according to law enforcement officials, generates billions of dollars in profits and is grown largely by international drug cartels and foreign criminals. Southern Oregon now rivals Northern California's notorious "Emerald Triangle" for growing illegal marijuana.

During raids in 2021 alone, according to public records, Southern Oregon officials across four counties — Jackson, Douglas, Klamath and Josephine — seized pot exceeding \$2.7 billion in value.

Illegal water use

According to public records the Oregon Water Resources Department released to the Capital Press Jan. 25 under the Oregon Public Records Law, there's been at least a 267% uptick in water theft-related complaints and investigations associated with cannabis during the past three years.

In 2019, there were 150 complaints or investigations of reported illegal water use associated with marijuana and hemp.

The number of complaints jumped to 344 in 2020 and 550 in 2021. OWRD has already received 6 complaints of cannabis-related water theft in January 2022.

Not all of the water theft is tied to illegal marijuana grows. According to Scott Prose, regional assistant watermaster and hemp specialist for the water department, many cases of illegal water use can be traced to licensed hemp growers who have little farming background or knowledge of water law and don't always realize they're taking more water than allowed.

Illegal marijuana growers, however, are more likely to knowingly steal water. Thieves regularly tap into hydrants, pump water from rivers and streams, dam creeks, break into tanks and truck water to grow sites from fee-for-service bulk water stations, which store drinking water.



David Yost

Living quarters of workers at an illegal marijuana grow site.



Sheriff Nathan Sickler



Kimberly McCullough

"The water trucking business has gone bonkers," said Jackson County, Ore., Sheriff Nathan Sickler.

Racquel Rancier, senior water policy coordinator with OWRD, said illegal water use "impacts those that are lawfully using water, fish habitat and downstream users."

Pollution

The second ugly head on the monster is pollution.

Det. Kile Henrich, who supervises the Josephine County, Ore., Marijuana Enforcement Team, said he has visited dozens of grow sites littered with open containers of fertilizer and pesticides, human filth and tangles of electrical wires posing fire hazards.

Other officers describe abandoned PVC pipe, tarps, buckets, stream banks laden with aluminum cans and food wrappers and slumping hoop houses.

"Growers have left a big scar on the land," said Sickler, the Jackson County sheriff.

It's not exclusive to Southern Oregon. Barb Iverson, owner of Wooden Shoe Tulip Farm in Woodburn, said at least four operations were near her property. She said growers fled one of the locations after harvest, leaving an abandoned house, junk cars and shredded sheets of plastic.

"I think it's more prevalent here than we realize," said Iverson. "We focus on Southern Oregon, but it's here. It's here in the (Willamette) Valley."

Land use violations

Often, landowners are fined — sometimes hundreds of thousands of dollars — for land use violations committed by illegal marijuana growers posing as legal hemp growers to whom they have leased acreage.

According to Sickler, the Jackson County sheriff, the county is "finding many land

owners have been less than honest with the property owners about what they are cultivating, as well as what permitting and licensing have been obtained."

Roger Pearce, Jackson County hearings officer, said landowners, whether or not they realized they were leasing to an illegal operation, may be held liable for pollution, illegal water use, construction of unpermitted structures and failure to register farm labor camps.

Inflated prices

Real estate experts say although some irredeemably damaged properties lose value, overall, illegal marijuana is driving up rents and land prices.

Part of the equation is more demand for limited land.

The other part is crop value. Illegal marijuana growers, with their high-value crop, can typically afford to pay more than the average farmer.

"The cannabis industry has made it more difficult for the traditional ag community to rent or lease or acquire land," said Jim Johnson, land use expert at the Oregon Department of Agriculture.

In a study of the impact of illegal marijuana production on rural land prices in Humboldt County, Calif., agricultural economist Benjamin Schwab and land use researcher Van Butsic found that when the median marijuana density in a watershed is doubled, farmland values increase 3% to 4%.

Oregon Rep. Pam Marsh, a Democrat who represents southern Jackson County, said her constituents are concerned. "It's really about these operations taking up land, making it more difficult for farmers to compete," said Marsh.

'Sucking labor'

Some farmers say illegal marijuana growers also out-compete legal farmers for laborers.

Several nonprofit leaders told the Capital Press that workers they have interviewed said they chose to work for illegal marijuana operations because they were promised higher wages. The illegal farms often pose as legal hemp or marijuana farms when advertising for workers.

"(The illegal industry) is unbelievable, out of control. It's just sucking labor," said Michael Moore, general manager of Quail Run Vineyards in the Rogue Valley.

Andrea Cantu-Schomus, spokeswoman for the Oregon Department of Agriculture, said farmers in every state report the labor shortage "is the greatest limiting factor on their farms."

"While (ODA) cannot answer specifically if unlicensed cannabis is making the labor issue worse, any pressure on the availability of labor will have consequences to the agriculture industries who rely on labor to meet their business needs," Cantu-Schomus wrote in an email.

Slavery and safety

Worse still are the tragic human impacts.

Henrich, the Josephine County detective, said he has visited illegal grow sites that have no restrooms and are littered with toilet paper and feces. Cardboard boxes are used for workers' homes.

At one site, he found an aging pig carcass that workers had been carving for food.

The Josephine County Sheriff's Office estimates tens of thousands of people work on illegal marijuana operations statewide, and experts say many are victims of human trafficking, or slavery.

"There's a lot of deceit that goes into this recruitment," said Robert Hammer, special agent in charge of investigations for the Department of Homeland Security.

Hammer estimates 50% of the workers are from Mexico, Central America and South America. Others are from China, Russia and Bulgaria. Some speak Hebrew. Only occasionally, workers are U.S. citizens.

Hammer, along with Kimberly McCullough, legislative director in the state Attorney General's Office, said Oregon needs a more "victim-centered approach" to enforcement. They say workers often scatter in fear during raids, but it's important for them to be helped.

"We don't yet have a uniform coordinated response," McCullough said. "We want to create some model policies and training for law



Sheriff Dave Daniel



Robert Hammer



Barb Iverson



U.S. Rep. Cliff Bentz

enforcement."

Community members, too, are endangered. Southern Oregon residents have reported being followed by vehicles, hearing shots and having knives pulled on them.

"It's the Wild West," said Moore, the vineyard owner.

Solutions

Most people agree that Oregon's illegal marijuana industry is a big problem. But farmers, legislators and officials disagree on how to solve it.

"I'd like to see the federal government get involved," said Josephine County Sheriff Dave Daniel.

U.S. Rep. Cliff Bentz, who represents Southern and Eastern Oregon, has called on U.S. Attorney General Merrick Garland for help. Kevin Sonoff, public affairs officer for the U.S. Attorney General's district office in Oregon, said the agency is "investigating."

Law enforcement officers say they want stiffer penalties, especially for repeat offenders.

Some advocates of legal marijuana say the problem isn't that marijuana legalization failed, but rather that more states haven't legalized it. Until more states — and the federal government — make marijuana legal, they say, the black market will continue.

Critics, in contrast, say making marijuana legal nationwide would create an even bigger mess and increase demand for lower-priced illegally grown pot. Oregon created this chaos, they say, by legalizing marijuana without an adequate plan to track and enforce it.

"The state woefully underfunded the regulatory agencies before allowing this," said Sickler, sheriff of Jackson County. "It was like: 'Let's open the floodgates and see what happens.' You can't put everything back in the jar."

Legislative efforts

Legislators, nonetheless, are trying to squeeze the monster back into the jar.

Oregon tweaked its hemp rules this year to make testing for THC — the substance that gets people high — more enforceable, and in 2021, state legislators passed House Bill 3000, which strengthened tracking and created a map law enforcement officers can use to determine if a site is licensed.

In December, Gov. Kate Brown called a special session during which lawmakers approved \$25 million for law enforcement efforts and \$5 million for oversight of water use and theft.

Further legislative propos-

als are expected in Oregon's 2022 session.

According to Marsh and Sen. Jeff Golden, D-Ashland, a few bills are in the works.

The first, Senate Bill 1564, would temporarily allow ODA to stop issuing industrial hemp grower licenses until the department deems the situation under control.

The bill faces opposition from farm groups, which say legal hemp growers should not be punished.

This wouldn't be the first time hemp was targeted. House Bill 3000 was similarly criticized for placing additional fees and requirements on hemp operations.

"It's frustrating when they raise our fees," said Iverson, the Woodburn-area farmer, who grows legal hemp, among other crops. "We're the easy targets."

Golden said that while he understands there will be resistance to SB 1564, he thinks it's necessary to get the current mess in order before creating an even bigger cannabis industry.

"I'm saying: 'Folks, let us take a breather. We're drowning,'" he said.

Meanwhile, an as-yet unnumbered bill is in the works in the Oregon House Water Committee. Legislators say the bill will stiffen penalties for water theft and increase the state Water Resources Department's enforcement capacity.

This bill, farm advocates say, will only be accepted by the farm community if it is highly targeted.

"This bill will have to be very carefully sculpted so it applies in limited circumstances," said Marsh.

Other potential proposals include providing grants to nonprofits that help human trafficking victims and creating rules around due process before a site can be raided.

While policymakers continue their tug-of-war, Oregon farmers continue to be surrounded by nests of illegal activity.

For cattle ranchers Jimmy Gallagher and Todd Fleisher of Sprague River, that means another year of uncertainty about water supplies and safety for them and their neighbors.

Gallagher's two toddlers often tag along with him for farm chores, but he said the area isn't safe anymore.

"I'd feel uncomfortable if my wife and kids came up here alone now," said Gallagher, standing beside a fence he and Fleisher built on the grazing allotment. "It's changed our way of life."

Buffer: Agriculture department was not involved in writing the act

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The Department of Fish and Wildlife, in consultation with tribes, would map "riparian management zones." Land with buildings, roads, trails and private beach access would be exempt, as would tribal land, unless the tribe gave permission.

The agriculture department was not involved in writing the act. The department's Natural Resources Assessment Section, however, this month analyzed the proposal's possible effect in the four counties.

In Skagit County, the converted 11,253 acres would include 1,728 acres of potatoes and 1,415 acres of field corn. The buffers would

also take 2,147 acres of hay and 1,334 acres of pasture.

In Lewis County, land converted to buffers would total 4,989 acres, including 2,221 acres of pasture, 59 acres of Christmas trees and 44 acres of barley.

In Yakima County, converted land would include 551 acres of pasture. Other losses include 31

acres of hops, 21 acres of apples and 10 acres of mint.

In Chelan County, buffers would take up 33 acres now used for growing pears, the agriculture department estimated.

Farmers last week told the House Agriculture and Natural Resources Committee that the bill ignores habitat provided by farms

and that mandatory buffers may destroy their livelihoods, especially in Western Washington.

"I fear this bill is sending a message to farmers — get out while you can," Skagit Valley farmer Kraig Knutzen said.

The buffer legislation has not passed either the Senate or House agriculture committees.