

# Water Works

## Marquette Law School Faculty Blog Pieces on Water Law and Policy



A civil engineer, a lawyer—and a rising thought leader on water-related issues in Wisconsin and beyond. That describes David Strifling, director of Marquette Law School’s Water Law and Policy Initiative. The initiative focuses on legal and regulatory aspects of water policy. It aims to promote collaboration and exchanges of information among those involved in the water sector and to increase broader knowledge. Professor Strifling is involved in a wide range of water research and associated efforts involving Marquette University and other institutions in Milwaukee. He was the lead organizer of “Public Policy and American Drinking Water,” a major conference at the Law School in September 2016.

Strifling, a 2004 graduate of Marquette Law School, worked for five years as a civil and environmental engineer before entering the legal profession. He holds a B.S. from Marquette in engineering and an LL.M. from Harvard Law School. He taught at Temple University in Philadelphia and practiced law at Quarles & Brady in Milwaukee before joining the Law School.

One venue for Strifling’s insights and scholarship has been the faculty blog on the Marquette Law School web page ([law.marquette.edu](http://law.marquette.edu)). Here are several of his pieces from the blog; in addition to the general editing and trimming done here, notes and, of course, hyperlinks are omitted. Visit the blog for further essays by Strifling and others.

### **Water: 2016 Retrospective (and Issues to Watch in 2017)**

January 16, 2017

The year 2016 brought numerous developments in the water law and policy sector at the national and state levels, and also here at Marquette University Law School’s Water Law and Policy Initiative; 2017 promises more on each front.

Nationally, the Flint drinking water crisis continued to dominate headlines. While the quality of Flint’s drinking water is slowly improving, it’s certainly too early to declare the crisis over. As a stark reminder of that, an ongoing investigation led to a series of criminal charges against those at the heart of the disaster.

Here at Marquette, drinking water issues also took center stage. The Water Law and Policy Initiative’s September “Public Policy and American Drinking Water” conference, organized as part of the Law School’s larger Public Policy Initiative, drew widespread attention and brought together national experts in a variety of water-related fields. It was at this event that Mayor Tom Barrett spoke of the pressing risks of lead in Milwaukee’s

water because of the 70,000 lead laterals serving City of Milwaukee residences. The mayor’s comments at and after the conference provoked intense media coverage and quickly resulted in the city’s making numerous policy changes. For example, Mayor Barrett agreed to provide free water filters to affected citizens and ultimately budgeted to pay a substantial part of the cost to replace (privately owned) lead service lines.

Many other stories also captured headlines in 2016.

The year just ended saw ongoing high-profile national litigation over the Environmental Protection Agency’s controversial “Clean Water Rule,” which generally clarifies the categories of waters the federal government may regulate under the Clean Water Act. In 2016, courts struggled to resolve which of them had jurisdiction to hear the substantive challenges to the rule. Many observers predicted that the case would eventually reach the Supreme Court. In mid-January 2017, in a mild surprise, the Court agreed to take up the jurisdictional question even before the merits are resolved. As I previously wrote in this space, Justice Kennedy’s comments in another 2016 opinion (specifically, his

concurrency in *United States Army Corps of Engineers v. Hawkes Co.*) do not bode well for the rule's fate at the Court. And during his campaign, President Donald Trump severely criticized and promised to repeal the rule, so it's possible that the Trump administration simply will not defend it in court. The Trump EPA could also initiate a rulemaking to withdraw or rewrite the rule. Other Supreme Court litigation that will bear watching in 2017 includes interstate battles between Florida and Georgia over surface water allocation, and between Mississippi and Tennessee over groundwater allocation.\*

Despite his criticism of the Clean Water Rule and his vow to abolish the EPA (which he has now reconsidered), Trump recently underscored the importance of "crystal clear water." His substantive plans in that direction remain unclear, though his administration's general approach to clean water and infrastructure issues has already drawn substantial commentary.

In February 2016, the Law School hosted a meeting of water experts from around the country to discuss American competitiveness in the water sector. The discussion ultimately resulted in a published study analyzing American talent, technology, investment, and infrastructure, using Milwaukee and the surrounding region as a case study.

At the state and local levels, too, groundbreaking developments arose. The City of Waukesha's first-of-its-kind application under the Great Lakes Compact to use Lake Michigan water for its public water supply generated substantial local and regional attention. As part of the Law School's "On the Issues with Mike Gousha" series and within the broader context of the university's sustainability-themed Mission Week, we arranged a conversation between the mayors of Waukesha and Racine that significantly advanced the public debate over Waukesha's request. The city's application was eventually approved, although it faces ongoing legal challenges (a 2017 story to watch).

In January 2016, I wrote on this blog about the erosion of the public trust doctrine in Wisconsin. That trend continued in May 2016, when the state attorney general issued an opinion taking the position that the Wisconsin Department of Natural Resources could not rely on the doctrine to impose conditions on permits for high-capacity wells. An ongoing legal challenge to that interpretation will be well worth following in the new year.

The Water Law and Policy Initiative also continued its ongoing research into policy solutions to water problems that affect us all, such as excess chloride transport to surface water and drinking water as a result of over-application of road salt and overuse of water softeners; the widespread presence of plastic microparticles in the Great Lakes; and water pollution from agricultural sources.

All in all, 2016 saw the continuing growth of water as an important issue at every level of society, and, in that sense, 2017 is likely to bring more of the same.

## Pathways to Future Environmental Legislation

January 11, 2017

Over the past quarter century, repeated congressional failures to enact any significant piece of environmental legislation led observers to describe such efforts as "gridlocked," "deadlock[ed]," "dysfunction[all]," "broken," the subject of "considerable, self-imposed inertia," and the surrounding atmosphere as "highly inhospitable to the enactment of major environmental legislation." Things weren't always this way; in the 1970s, a remarkable burst of legislative activity largely shaped the field we know today as federal environmental law.

In a paper soon forthcoming in the *Journal of Land Use and Environmental Law*, I argue that a perhaps minor and certainly uncontroversial piece of environmental legislation ►►



\*For discussion of Justice Kennedy's concurrence, see the entry, from June 3, 2016, on page 60. On February 28, 2017, President Donald Trump directed the EPA to begin the process of reconsidering the rule discussed here. – Ed.

known as the Microbead-Free Waters Act of 2015 (“the Act”) reveals potential pathways through or around this modern gridlock. The Act prohibits the manufacture or introduction into interstate commerce of useful—but environmentally harmful—microscopic plastic particles known as “microbeads” that are commonly used in cosmetic products. Its provisions are direct and uncomplicated.

Yet the strategic building blocks underlying the Act—including an emphasis on public health issues and broad stakeholder support driven by industry concerns about unfair competition and opposition to local legislation—may provide innovative and useful foundations for future efforts to pass environmental legislation.



Microbeads present complex commercial and ecological issues. They are cost-effective cleansers and exfoliants intended to be rinsed down the drain as part of the normal cosmetics product lifecycle, but they typically cannot be removed in wastewater treatment facilities due to their lightness and exceedingly small size. Once in open waters, microplastics

(like all plastics) tend to concentrate toxins, and they are attractive to aquatic life as a food source because they appear to be fish eggs based on their size and shape. (The photo above at left shows microbeads ingested by a larval-stage perch.) After initial ingestion, the accumulated toxins bioconcentrate up the food chain and thereby pose a threat to human health. Once present in open waters, microbeads cannot be effectively removed because any attempt to do so would necessarily also capture plankton and other essential parts of the food chain. New research shows that this threat is particularly immediate in the Great Lakes, where microbead concentrations equal or exceed those found in oceans.

The Act banning microbeads sailed through Congress with no real opposition, passing in the House by voice vote and in the Senate by unanimous consent. Dan Farber, a longtime environmental law scholar, labeled this a “minor miracle.”

Although the easy passage can partly be explained by the absence of any determined opposition, a closer examination reveals several positive traits, the emphasis

of which may provide a useful foundation for future efforts to pass environmental legislation. First, the Act was tightly focused and of modest scope. Plastics are the leading cause of anthropogenic pollution in our rivers and lakes, but the Act makes no effort to address that problem in its entirety; instead, it contains simple and direct language closely focused on one clearly delineated aspect of the problem.

Second, the Act attracted a broad coalition of stakeholder support. In one sense, this was not surprising; environmental and community groups have long campaigned for a microbead ban. Support from industry was more unexpected, but not unprecedented; in fact, some public choice theorists believe that almost all public regulation is really private-interest rent-seeking in disguise. By that way of thinking, environmental regulations can be reduced to tools of regulated industry intending to burden rivals. And the national ban imposed by the Act eliminated the risk of a patchwork of substantively different bans enacted by individual states.

Third, the Act focused on public health risks in addition to environmental concerns, perhaps blunting the ordinary partisan blockade to new environmental legislation. Crafting future environmental legislation to fit these constraints will significantly increase the chances of success.

Past experience shows that environmental gridlock doesn’t have to be the norm. During the environmental law revolution of the 1970s, overwhelming majorities of a divided Congress enacted more than a dozen major federal environmental laws, including the National Environmental Policy Act (1970), the Clean Air Act (1970), the Federal Water Pollution Control Act, which is now commonly known as the Clean Water Act (1972), the Federal Environmental Pesticide Control Act (1972), the Endangered Species Act (1973), the Safe Drinking Water Act (1974), the Resource Conservation and Recovery Act (1976), the Toxic Substances Control Act (1976), and the Comprehensive Environmental Response, Compensation, and Liability Act (1980). Few, if any, subject matter areas have ever seen such a concentrated outpouring.

Shortly after I wrote the microbeads article, Congress passed a bill reforming the Toxic Substances Control Act (“TSCA”), the cornerstone of chemical regulation in the United States. In several respects, the effort to pass the TSCA reform bill mirrored and confirmed the strategies

that led to the Act. First, the TSCA package emphasized the public health benefits of the legislation in addition to the environmental benefits. Second, supporters of the TSCA compromise legislation attempted to build broad stakeholder consensus to eliminate a patchwork approach.

In terms of sheer scope, I don't contend that the Act is on the level of the Clean Water Act or the other landmark laws passed in the 1970s. But the Act and the TSCA reform package reveal that Congress can indeed pass smart, targeted environmental legislation. Proponents of future environmental legislation can benefit from the Act's example by setting a reasonable scope and focus; by building a broad stakeholder coalition that includes, rather than demonizes, industry; by eliminating "patchwork" regulation to the extent possible; and by emphasizing the public health aspects of proposed legislation.

## Marquette Law School Poll Reveals Public Perceptions of Water-Related Issues

September 16, 2016

Public perceptions of environmental risk have long been controversial when used as a tool to help set public policy. Many scholars have argued that there is a fundamental mismatch between "notoriously inaccurate" *public* perceptions of the magnitude and sources of environmental risks, on the one hand, and *expert* analyses of the same. Even if that is true, public perceptions would be worth measuring for other reasons: for example, studies have confirmed that "federal environmental laws reflect public perceptions of risks more than they do scientific understanding." And just this year, a gathering of environmental law scholars discussing the future of environmental law stressed the increasing ethical obligation to consider (often-marginalized) community voices, turning environmental law into "a tool for collaboration and connection . . . rather than conflict." In short, perhaps "public perceptions of environmental risk deserve more credit than comparative risk analysts admit."

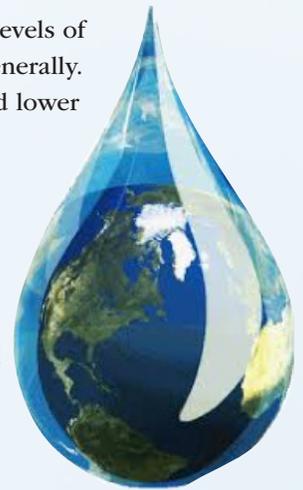
Despite a general sense of increasing public concerns about issues of water quality, surprisingly few efforts have been made to quantify the level of public disquiet over these problems. To help fill that gap in Wisconsin, two surveys were conducted in August 2016 by the Marquette

Law School Poll. They found significant levels of concern over water quality and policy generally. However, most Wisconsin voters reported lower levels of worry regarding their personal sources of drinking water.

Recent reporting has highlighted drinking water concerns across the state—including lead levels, agriculture-related bacterial contamination, and a failed legislative effort to ease municipal water system privatization. Our survey results showed that 78 percent of respondents had heard at least some about the lead crisis in the Flint, Mich., water supply. When asked about the safety of the water supply in Wisconsin's own low-income communities, 68 percent were very or somewhat concerned, 17 percent not too concerned, and just 13 percent not at all concerned. However, when asked about the safety of the water supply in their own community, respondents were more confident. A combined 56 percent were either not too concerned or not at all concerned, with 44 percent being very or somewhat concerned.

People from lower-income households were more concerned about their communities' water quality. Among households making less than \$40,000, 53 percent reported being very or somewhat concerned. This view was shared by 36 percent of those in households earning at least \$75,000. Wealthier respondents were also the least likely to express concern about the quality of water in low-income communities. Thirty-three percent of those earning at least \$75,000 expressed little or no concern about water quality in low-income communities, compared with 19 percent of respondents earning less than \$40,000.

In a tangible demonstration of interest in water quality, 56 percent of respondents reported having had their drinking water tested at least once in the past. As expected, testing is much more common among residents served by private wells. According to the Wisconsin DNR, the state currently holds over 800,000 private wells. Thirty-four percent of registered voters reported receiving their home's drinking water from a private well. Of these private-well users, 81 percent had tested their drinking water—compared to 42 percent of those serviced by public utilities. ▶▶



In January 2016, the state Assembly passed a bill easing the ability of municipalities to sell their drinking water systems to private companies. After widespread opposition from civic groups, the Senate declined to hold a vote. The Marquette poll is the first measurement of statewide public opinion on the issue. Respondents were asked, “How concerned, if at all, would you be if a private company were responsible for treating and delivering your drinking water supply?” Seventy percent of registered voters said they would be very or somewhat concerned, 14 percent not too concerned, and 13 percent not at all concerned. Unlike measures of concern or previous testing, partisanship plays a strong role. Thirty percent of Republicans reported they would be very concerned, compared with 57 percent of Democrats. Republicans, however, divide substantially along geographical lines. Twice as many rural Republicans said they would be “very concerned” by privatization (40 percent) as suburban and urban Republicans (20 percent).

Widespread skepticism of water privatization does not, however, indicate great confidence in government regulation. Views of the state government were middling. Ten percent of registered voters said the state of Wisconsin was doing an “excellent” job in protecting the safety of public drinking water. Forty-two percent said the state was doing a “good” job, 35 percent said “fair,” and 9 percent “poor.” Only 2 percent described the job done by the federal government as “excellent,” 29 percent said “good,” 43 percent “fair,” and 21 percent “poor.” Wisconsin Republicans are significantly more likely to rate highly the job being done by the state government in protecting the water supply. Sixty-seven percent rate the state’s job as good or excellent, compared with just 44 percent of Democrats. Partisan differences in federal approval are less distinct, though Democrats are slightly more positive. These responses may be more indicative of attitudes toward the state and federal governments generally.

## Justice Kennedy Criticizes “Notoriously Unclear” and “Ominous” Scope of the Clean Water Act

June 3, 2016

The Clean Water Act, as characterized by the Supreme Court, requires regulatory agencies to make difficult choices about exactly where “water ends and land begins.” Whether a particular property contains “waters of the United States,” the touchstone for federal jurisdiction

under the Act, is not easy to determine, especially when the question involves not traditionally navigable waters but wetlands. The Environmental Protection Agency defines “wetlands” as areas such as swamps, marshes, and bogs that are periodically inundated with water. Severe consequences flow from unpermitted actions that impact “waters of the United States.” The Act imposes criminal liability and civil penalties to the tune of \$37,500 per day of violation. Upon request, the Army Corps of Engineers will issue jurisdictional determinations (“JDs”), specifying whether a particular property contains jurisdictional waters. In recent years, the Supreme Court has wrestled with various aspects of wetlands issues again and again. The most recent such case, *United States Army Corps of Engineers v. Hawkes Co.*, No. 15-290, raised the question of whether the Corps’ JDs constitute “final agency action” that is immediately appealable in federal court under the *Bennett v. Spear* (1997) analysis rooted in the Administrative Procedure Act.

Earlier this week, the Supreme Court unanimously ruled that JDs constitute final agency action and are immediately appealable. The Court quickly rejected the Corps’ two arguments to the contrary: first, the rather unreasonable suggestion that affected citizens could simply proceed without a permit, risking an enforcement action during which one could argue that no permit was required; and second, that upon receiving a “positive” JD, affected citizens could apply for a permit and seek judicial review of the JD upon the conclusion of the lengthy permitting process (the property owners in *Hawkes* estimated that it would cost well over \$100,000 to “earn” the appeal right under that scenario).

But it wasn’t the majority opinion that had everyone talking; Justice Anthony M. Kennedy stole the show with a three-paragraph concurrence. He wrote that an immediate appeal right was especially important given that the reach of the Act is “notoriously unclear” and subjects landowners to “crushing” consequences, “even for inadvertent violations.” Justice Kennedy described the Act’s reach as “ominous,” and wrote that it “continues to raise troubling questions regarding the Government’s power to cast doubt on the full use and enjoyment of private property throughout the Nation.”

The *Hawkes* concurrence is a striking contrast to Justice Kennedy’s opinion in *Rapanos v. United States* (2006), another wetlands case. In *Rapanos*, Kennedy conducted a fairly searching analysis of “the Act’s text, structure, and purpose,” and formulated a relatively

broad test under which federal jurisdiction exists over any wetland or other water with a “significant nexus” to navigable waters. He wrote there that “the significant-nexus test itself prevents problematic applications of the statute,” and recognized that “[i]mportant public interests are served by the Clean Water Act in general and by the protection of wetlands in particular.”

Without question, *Hawkes* was a defeat for the Obama administration. Yet the government’s far greater concern is likely that Justice Kennedy’s position in *Hawkes* doesn’t bode well for one of the administration’s signature environmental achievements, the “Waters of the United States” rule, now known as the “Clean Water Rule.” That rule attempts to clarify the definition of “waters of the United States,” and by extension the scope of the Act’s coverage, to make it more predictable. Dozens of states and other petitioners have already challenged the rule in a variety of federal courts, many on the grounds that it unlawfully expands federal jurisdiction, with most such suits now consolidated in the Sixth Circuit. Most expect that case to end up before the Supreme Court, where Justice Kennedy—who just described the Act’s reach as “ominous,” “unclear,” and “troubling”—will hold a critical vote.

## A Rejuvenated Navigational Servitude?

March 16, 2016

As a general rule, within its borders each individual state holds title to the beds of water bodies that were navigable at the time of its statehood and has jurisdiction to regulate activity upon those waters. State authority over navigable waters is not absolute, however. The “navigational servitude” is an important constraint on state power. It flows from the Commerce Clause and asserts “the paramount power of the United States to control [navigable] waters for purposes of navigation in interstate and foreign commerce.” This power justifies, for example, the acquisition and holding of private lands “to deepen the water . . . or to use them for any structure which the interest of navigation, in [the government’s] judgment, may require.” When validly exercised, the navigational servitude excuses the federal government even from the Fifth Amendment’s Takings Clause, because “the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been

subject.” Today, however, the navigational servitude has largely retreated into obscurity. It is often viewed as a relic from a bygone era when rivers were the nation’s primary mode of commerce and long-distance travel.

The advent of emerging technologies that will make water travel more attractive may catapult the navigational servitude to renewed prominence. In the not-too-distant future, transformational technologies like hovercraft and airships may become common modes of commercial and public travel over navigable waters. Integrating the resulting water-based activity into our legal and social systems would require involvement at all levels of governance, including the courts. In fact, a fascinating example of a related dispute has already reached the United States Supreme Court.



Conceivably, both hovercraft and airships could revolutionize water travel for personal and commercial purposes. Hovercraft—smaller vehicles that slide on a pressurized current of air about nine inches above the surface—are able to fly smoothly over land, still or swift water, flooded or frozen rivers, and thin or broken ice at average speeds of 35 mph or more, and maximum speeds that are much higher. Advocates claim that hovercraft are among the most environmentally friendly modes of travel, using less energy and generating less carbon emissions than comparable craft. Future versions may be powered by hydrogen-electric motors. For longer trips or larger cargos, airships may be the answer. Manufacturers have been working for decades to develop them and now claim that they offer significant reductions in fuel consumption compared to other air vehicles, while remaining significantly faster than today’s land and sea transportation systems. Increased traffic on water networks would also ease roadway congestion. No doubt, however, broad-based use of hovercraft and airships would require the construction of significant infrastructure, and the navigational servitude could play a role in those efforts. ■