

**OBAMA, TRUMP & BIDEN:
WHERE ARE WE NOW ON REGULATION OF FEDERAL WATERS
UNDER THE CLEAN WATER ACT**

JAMES D. BRADBURY, *Austin*
James D. Bradbury, PLLC

TIFFANY DOWELL LASHMET, *Amarillo*
Texas A&M AgriLife Extension Service

Co-author:

COURTNEY COX SMITH, *Austin*
James D. Bradbury, PLLC

PAUL GOERINGER, *College Park, Maryland*
University of Maryland

State Bar of Texas
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JAMES D. BRADBURY

James D. Bradbury, PLLC

9111 Jollyville Road

Suite 220

Austin, TX 78759

jim@bradburycounsel.com

(512) 953-5801

After spending many years in large law firms, Jim Bradbury left to form his own practice focused on land, environmental, water and regulatory matters, including the imminent water policy issues facing rural Texas. His firm has offices in Fort Worth and Austin. Mr. Bradbury advises clients on land use and permitting as well as enforcement matters before state authorities, EPA and the Department of Justice and handles civil litigation that arises out of environmental issues. Jim has a focus on the legal and policy issues facing Texas landowners and producers, working with statewide agricultural associations on legislative and regulatory matters. His firm also prepares and submits appellate amicus briefing to the Texas Supreme Court on issues of statewide importance. Mr. Bradbury also has significant experience in the environmental aspects of hydraulic fracturing production, including surface use rights, eminent domain and pipelines. Mr. Bradbury is an adjunct Professor at Texas A&M Law School, teaching Ag Law, serves as a member of the Natural Resources Program and taught a Special Projects course in Texas Eminent Domain Policy. He regularly speaks on landowner rights and water issues as they affect Texas public policy and serves as Chair of the Board of the Texas Land Trust Council working to conserve working farms and ranches.

TIFFANY DOWELL LASHMET
Associate Professor & Extension Specialist
Texas A&M AgriLife Extension Service
6500 Amarillo Blvd. West Amarillo, TX 79106
tdowell@tamu.edu
806-677-5668

Tiffany Dowell Lashmet is an Associate Professor and Extension Specialist in Agricultural Law with Texas A&M AgriLife Extension. She focuses her work on legal issues affecting Texas agricultural producers and landowners including agricultural leases, water law, oil and gas law, eminent domain, easements, and landowner liability. She is a past member of the Board of Directors for the American Agricultural Law Association and is part of the State Bar of Texas John Huffaker Agricultural Law Course Planning Committee. In 2016, Tiffany was named the State Specialist of the Year for Texas Agriculture by the Texas County Agricultural Agents Association. In 2019, Tiffany was awarded the American Agricultural Law Association Excellence in Agricultural Law Award for Academia. She authors the award-winning Texas Agriculture Law Blog and hosts the award-winning Ag Law in the Field Podcast.

Tiffany grew up on a family farm and ranch in Eastern New Mexico, received her Bachelor of Science in Agribusiness (Farm and Ranch Management) summa cum laude at Oklahoma State University, and her law degree summa cum laude at the University of New Mexico. Prior to joining Texas A&M AgriLife Extension, Tiffany worked for four years at a law firm in Albuquerque practicing civil litigation. She is licensed to practice law in New Mexico and Texas. She lives in the Texas Panhandle with her husband, Ty, and her children Braun and Harper.

COURTNEY COX SMITH

James D. Bradbury, PLLC

9111 Jollyville Road

Suite 220

Austin, TX 78759

courtney@bradburycounsel.com

(512) 953-5801

Courtney Cox Smith enjoys a diverse practice with James D. Bradbury, PLLC, focusing on a wide range of issues of importance to Texas landowners and agricultural producers, including environmental, water law, eminent domain, regulatory, and general litigation. Courtney assists clients with cases before state and federal courts, the State Office of Administrative Hearings, Texas Commission on Environmental Quality, and Public Utility Commission of Texas. She has extensive experience in preparing and filing appellate amicus briefs covering important policy matters for Texas agriculture, including before the Texas Courts of Appeals, Texas Supreme Court, and the Fifth Circuit Court of Appeals.

Courtney grew up in Fort Worth, Texas. She attended Baylor University, where she earned her Bachelor of Arts degree in American Studies. After graduating from Baylor, Courtney attended and received her law degree from Boston College Law School. After law school, Courtney returned to Texas where she practiced in Fort Worth and Austin before joining James D. Bradbury, PLLC. Courtney lives in Houston with her son, Wyatt.

PAUL GOERINGER
Extension Legal Specialist
University of Maryland
2200 Symons Hall
College Park, MD 20742
lgoering@umd.edu
301-405-3541

Paul Goering is a Senior Faculty Specialist and the Extension Legal Specialist at the University of Maryland. His research and extension program is focused on agricultural leases, energy leases, landowner liability, production contracts, agricultural nuisance issues, environmental law, and estate planning issues impacting agricultural producers in Maryland. Paul has authored over a hundred articles and is a sought-after speaker for Extension meetings.

He grew up on his family's wheat and cattle operation in Western Oklahoma. Upon graduating from high school, Paul attended Oklahoma State University and graduated with a Bachelor of Science in Agricultural Economics. After graduating from OSU, Paul for some strange reason still unknown to him decided to attend law school and graduated with a Juris Doctorate from some school in Norman, Oklahoma (also known as the University of Oklahoma). After law school, Paul received an LL.M in Agricultural Law and a Master of Science in Agricultural Economics from the University of Arkansas and is licensed to practice in Oklahoma. Paul is a board member for the American Agricultural Law Association, and an active member of the Agriculture Law Section of the Maryland State Bar Association, and Southern Agricultural Economics Association, and a member of the Agricultural & Applied Economics Association.

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I. INTRODUCTION

The Clean Water Act (“CWA” or “Act”) is an important component of the federal scheme of environmental regulation. Over the nearly fifty years since its enactment in 1972, there has been significant litigation surrounding the scope, interpretation, and meaning of the Clean Water Act. Currently, there are three main areas of particular interest to agricultural producers across the United States: (1) the definition of “waters of the United States”; (2) the applicability to indirect discharges; and (3) the potential applicability to air pollutants.

II. THE DEFINITION OF “WATERS OF THE UNITED STATES”

The meaning of the term “waters of the United States” has been an ongoing legal battle for nearly the entirety of the existence of the CWA. Although the Act itself provides that the NPDES permitting requirement is applicable to “waters of the United States,” it failed to define the meaning of that phrase. This has left landowners, regulators, and even the United States Supreme Court¹ to struggle ever since. In recent years, the Environmental Protection Agency (“EPA”) and the US Army Corps of Engineers (“ACE”) have sought to end the controversy by promulgating a regulatory definition of “waters of the United States.”

A. 2015 WOTUS Rule

In 2014, the EPA and ACE issued a proposed definition of “waters of the United States,” which became known as the WOTUS Rule.² The agencies received over one million comments on the proposed rule and published the final rule in June 2015, to be effective August 28, 2015.³

The agencies attempted to interpret the scope of WOTUS “using the goals, objectives and policies of the statute, the Supreme Court case law, the relevant and

available science, and the agencies’ technical expertise and experience as support.”⁴

This rule essentially provides several categories of jurisdictional waters:

1. Categorically Jurisdictional Waters

First, certain waters are categorically jurisdictional: traditional navigable waters, interstate waters, including interstate wetlands, the territorial seas, and impoundments of waters identified as WOTUS.⁵ Traditional navigable waters, the territorial seas, impoundments of waters identified as a WOTUS have not been subject to much of the controversy surrounding the WOTUS Rule. Interstate waters, however, were not included in the Navigable Waters Protection Rule definition, creating a significant difference as discussed below.

2. Definitionally Jurisdictional Waters

Second, the WOTUS Rule designates two categories of waters as jurisdictional if the waters meet the definitions included within the Rule. Much of the controversy and legal debate surrounding the WOTUS Rule focuses on these definitions of tributaries and adjacent waters.

a. Tributaries

The WOTUS Rule defines tributaries for the first time under the Clean Water Act and provides that all tributaries of traditional navigable waters, interstate waters, and the territorial seas are considered a WOTUS.⁶ Tributaries are defined as “water that contributes flow, either directly or through another water,” to a traditional navigable water, interstate water, or territorial sea “that is characterized by the presence of the physical indicators of a bed and banks and ordinary high water mark.”⁷ Tributaries can be naturally occurring, man-made, or man-altered and “include[] waters such as rivers, streams canals, and ditches not [otherwise] excluded” by the Obama Rule.⁸

b. Adjacent Waters

The Obama Rule also provides that “all waters adjacent” to traditional navigable waters, interstate waters, the territorial seas, impoundments of a WOTUS, and tributaries, including wetlands,⁹ ponds, lakes,

¹ See *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006).

² See Definition of “Waters of the United States” Under the Clean Water Act, 79 Fed. Reg. 22,188 (proposed April 21, 2014).

³ See Clean Water Rule: Definition of “Waters of the United States” Final Rule 80 Fed Reg. 37,054 (June 29, 2015).

⁴ *Id.*

⁵ See 33 C.F.R. § 328.3(a)(1)–(4) (2020).

⁶ See 33 C.F.R. § 328.3(a)(5) (2015).

⁷ *Id.* at § 328.3(c)(3).

⁸ *Id.*

⁹ Wetlands are defined as “those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support a prevalence of vegetation

oxbows, impoundments, and similar waters, are jurisdictional.¹⁰

Two additional definitions prove critical to understanding the scope of the term adjacent waters pursuant to the WOTUS Rule. First, adjacent under the regulations, “means bordering, contiguous, neighboring” and includes “waters separated by [] dikes or barriers, natural river berms, and beach dunes”¹¹ Second, the WOTUS Rule defines neighboring waters as “all waters located within 100 feet of the ordinary high water mark” of traditional navigable waters, interstate waters, the territorial seas, impoundments of a WOTUS, and tributaries; “all waters located within the 100-year floodplain” of traditional navigable waters, interstate waters, the territorial seas, impoundments of a WOTUS, and tributaries; and “all waters within 1,500 feet of the high tide line”¹² of a traditional navigable water, interstate water, or the territorial seas.¹³ If any portion of a water body is located within these bounds, the entire water is considered neighboring.¹⁴

With regard to open waters such as ponds or lakes, the adjacent waters include any wetlands within or abutting the ordinary high water mark.¹⁵ Adjacent waters include all waters that connect segments of traditional navigable waters, interstate waters, the territorial seas, impoundments of a WOTUS, and tributaries.¹⁶

The WOTUS Rule expressly excludes “waters being used for established normal farming, ranching, and silviculture activities,” from the “adjacent” definition, citing to the Section 404 exception defining normal farming, silviculture, and ranching activities “such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices.”¹⁷

c. Case-by-Case Evaluation

Certain waters would be subject to a case-by-case, factual evaluation of whether or not they are a WOTUS based on the existence of a significant nexus to a jurisdictional water. The WOTUS Rule defines “significant nexus” as “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” traditional navigable waters, interstate waters, or territorial seas.¹⁸ The effect must be more than speculative or insubstantial.¹⁹ The WOTUS Rule lists several functions relevant to analyzing significant nexus, including “sediment trapping; nutrient recycling; pollutant trapping, transformation, filtering, and transport; retention and attenuation of floodwaters; runoff storage; contribution of flow; export of organic matter; export of food resources, and; provision of life cycle dependent aquatic habitat.”²⁰

a. Regional water features with a significant nexus.

Certain regional water features are jurisdictional if the features possess a “significant nexus” to traditional navigable waters, interstate waters, or the territorial seas.²¹ For purposes of the significant nexus analysis, all waters “similarly situated” within the “watershed that drains” into the jurisdictional water will be aggregated.²² The waters included under this category are: “(i) prairie potholes (a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest); (ii) Carolina and Delmarva bays (ponded, depressional wetlands that occur along the Atlantic coastal plain); (iii) Pocosins (evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic Coastal plain); (iv) Western vernal pools (seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers); and (v) Texas coastal prairie wetlands (freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast).”²³ The analysis of whether a feature listed in this category has a “significant nexus” to waters used or susceptible to use in interstate commerce, interstate waters, or the territorial seas is to be conducted on a case-by-case basis.

b. Proximity to flood plain or high tide line with a significant nexus.

The Obama Rule includes as jurisdictional all waters that are determined on a case-specific basis to have a significant nexus to a traditional navigable water,

typically adapted or life in saturated soil conditions” including “swamps, marshes, bogs, and similarly areas.” *Id.* at 328.3 (c)(4).

¹⁰ *See id.* at § 328.3(a)(6).

¹¹ 33 C.F.R. § 328.3(c)(1) (2015).

¹² The “high tide line” is the “intersection of the land with the water’s surface at the maximum height reached by a rising tide.” *Id.* at § 328.3(c)(7).

¹³ *Id.* at § 328.3(c)(2).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 33 C.F.R. § 328.3(c)(2) (2015).

¹⁷ *Id.* at § 328.3(c)(1); *see also* 33 USC § 1344(f)(1)(a).

¹⁸ 33 C.F.R. § 328.3(c)(5) (2015).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *See id.* at § 328.3(a)(7).

²² *Id.*

²³ 33 C.F.R. § 328.3(a)(7) (2015).

interstate water, or territorial sea and are either (1) located within the 100-year floodplain of a traditional navigable waters, interstate waters, or territorial sea or (2) within 4,000 feet of the high tide line or ordinary high water mark of a traditional navigable waters, interstate waters, territorial sea, impoundment of jurisdictional water, or tributary.²⁴ Any water determined to have a significant nexus that is only partially within the floodplain or within 4,000 feet of the high tide line or ordinary high water mark shall be entirely deemed a WOTUS.²⁵

c. Categorical Exclusions

The WOTUS Rule also categorically excludes several type of water from the scope of the definition of “waters of the United States, including:

- Waste treatment systems;
- Prior converted cropland;
- Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary;
- Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands;
- Ditches that do not flow either directly or through another water into traditional navigable waters, interstate waters, or territorial sea;
- Artificially irrigated areas that would revert to dry land should application of water to that area cease;
- Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;
- Artificial reflecting pools or swimming pools on dry land;
- Small ornamental waters created on dry land;
- Water-filled depressions created in dry land incidental to mining or construction;
- Erosional features such as gullies, rills, or other ephemeral features that do not meet the definition of a tributary, non-wetland swale, and lawfully constructed grassed waterways;
- Puddles;
- Groundwater (including groundwater drained through subsurface drainage systems);

- Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land; and
- Wastewater recycling structures constructed on dry land, groundwater recharge basins, percolation ponds built for wastewater recycling, and water distributary structures built for wastewater recycling.²⁶

Not surprisingly, there were numerous legal challenges to the WOTUS Rule across the country at both the state and federal levels. In *Georgia v. Wheeler*, for example, the court held the WOTUS Rule violated the EPA’s authority pursuant to the Clean Water Act with regard to several portions of the rule including the overly broad nature of the definitions and inclusion of interstate waters, tributaries, and adjacent waters. Additionally, the court held that the WOTUS Rule violated the Administrative Procedures Act as it was “not a logical outgrowth” of the proposed rule. In particular, the distance measurements included with regard to adjacency and the existence of a farming exception for adjacent waters but not for tributaries were flagged as problematic by the court as they were not included in the proposed rule, depriving the public on the ability to comment on these provisions.

B. The 2020 Navigable Waters Protection Rule

Within one month after his inauguration, President Trump issued an Executive Order requiring the EPA and Corps of Engineers to either rescind or revise the WOTUS Rule and to consider interpreting the term waters of the United States in a manner consistent with Justice Scalia’s plurality opinion in *Rapanos*.²⁷

In July 2017, as part of a two-step process, the EPA published a proposed rule referred to as the “step-one rule” to rescind the WOTUS Rule and essentially re-codify the regulatory definition of WOTUS that existed before the Obama Rule’s enactment.²⁸ A year later, on July 12, 2018, the agencies published a supplemental notice of public rulemaking to clarify, supplement, and seek additional comment on the Step One notice of proposed rulemaking.²⁹ A final “step-one rule,” known as the Repeal Rule, was effective on December 23, 2019.³⁰ This rule “implemented the pre-2015 Rule regulations informed by applicable agency guidance

²⁴ See 33 C.F.R. § 328.3(a)(8) (2015).

²⁵ *Id.*

²⁶ 33 C.F.R. § 328.3(b) (2015).

²⁷ See Exec. Order No. 13,778, 82 Fed. Reg. 12,497 (Feb. 28, 2017).

²⁸ See Definition of “Waters of the United States” Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899

(proposed July 27, 2017). See also discussion *supra* Section II.

²⁹ See Definition of “Waters of the United States” Recodification of Preexisting Rule, 83 Fed. Reg. 32,227 (July 12, 2018).

³⁰ Definition of “Waters of the United States” Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (proposed Oct. 22, 2019).

documents and consistent with Supreme Court decisions and longstanding agency practice.”³¹

On December 11, 2018, the EPA and Corps of Engineers issued a proposed their “step-two” rule to revise the definition of WOTUS.³² Public comment was allowed from February 14, 2019 through April 15, 2019. The final rule, termed the Navigable Waters Protection Rule (“NWPR”), was released in January 2020 and became effective on June 22, 2020.³³

The final NWPR essentially includes three sections: (1) Jurisdictional waters; (2) Non-jurisdictional waters; and (3) Definitions.

1. Jurisdictional Waters

The NWPR defines waters of the United States as:

- (i) The territorial seas, and waters currently used, previously used, or may be susceptible to use in interstate or foreign commerce, including waters subject to the ebb and flow of the tide;³⁴
- (ii) Tributaries;
- (iii) Lakes, ponds, and impoundments of jurisdictional waters;³⁵ and
- (iv) Adjacent wetlands.³⁶

As with the WOTUS Rule, the definitions of tributary and adjacent wetlands are critical to understanding the scope of the Trump waters of the United States definition.

a. Tributaries

The Trump Rule defines a tributary as “a river, stream, or similar naturally occurring surface water

channel that contributes surface water flow” into a jurisdictional water in category 1(i) “in a typical year either directly or through” a tributary; lake, pond, or impoundment of jurisdictional water; or adjacent wetland.³⁷ A tributary must be perennial³⁸ or intermittent³⁹ in a typical year.⁴⁰

b. Adjacent Wetlands

The NWPR defines adjacent wetlands⁴¹ as those that:

- (A) abut, meaning to touch at least one point or side of, a water identified in category (1)(i), (ii), or (iii) above;
- (B) are inundated by flooding from a water identified in category (1)(i), (ii), or (iii) above in a typical year;
- (C) are physically separated from a water identified in category (1)(i), (ii), or (iii) above only by a natural berm, bank, dune, or similar natural feature, or;
- (D) are physically separated from a water identified in category (1)(i), (ii), or (iii) above only by an artificial dike, barrier, or similar artificial structure so long as that structure allows for a direct hydrologic surface connection between the wetlands and the water identified in category (1)(i), (ii), or (iii) above in a typical year, such as through a culvert, flood or tide gate, pump, or similar artificial feature.⁴²

An adjacent wetland is jurisdictional in its entirety when a road or similar artificial structure divides the wetland,

feature, or through a debris pile, boulder field, or similar natural feature. It is also jurisdictional if it is inundated by flooding from a water in categories (1)(i), (ii), and (iii) above. *Id.* at § 328.3(c)(6).

³⁶ *Id.* at § 328.3(c)(1)–(16).

³⁷ *Id.* at § 328.3(c)(12).

³⁸ Perennial is defined as having ‘surface water flowing continuously year-round.’ *Id.* at § 328.3(c)(8).

³⁹ Intermittent is defined as ‘surface water flowing continuously during certain times of the year and more than in direct response to precipitation (e.g. seasonally when the groundwater table is elevated or when snowpack melts).’ 33 C.F.R. § 328.3(c)(5) (2020).

⁴⁰ *Id.* at § 328.3(c)(12).

⁴¹ “Wetlands” are “areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.” *Id.* at § 328.3(c)(16).

⁴² *Id.* at § 328.3(c)(1).

³¹ *Id.* at 56,661.

³² See Revised Definition of “Waters of the United States,” 84 Fed. Reg. 4,154, (proposed Feb. 14, 2019).

³³ The Navigable Waters Protection Rule: Definition of “Waters of the United States”, 85 Fed. Reg. 22,250 (effective on June 22, 2020) (to be codified at 33 C.F.R. § 328.3).

³⁴ “Those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun.” These waters end where “the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.” 33 C.F.R. § 328.3(c)(11) (2020).

³⁵ Defined as standing bodies of open water that contribute surface flow to a jurisdictional water identified in category 1(i) in a typical year either directly or through a tributary; lake, pond, or impoundment of jurisdictional water; or adjacent wetland. A lake, pond or impoundment does not lose its jurisdictional status if it contributes surface water flow to a downstream jurisdictional water in a typical year through a channelized non-jurisdictional surface water feature, through a culvert, dike, spillway, or similar artificial

so long as the structure allows for a direct hydrologic surface connection through or over that structure in a typical year.

2. Non-Jurisdictional Waters

The NWPR excludes the following categories from the definition of “waters of the United States,” meaning the Clean Water Act is inapplicable to :

- (i) Waters or water features not identified as “jurisdictional waters” under this definition;
- (ii) Groundwater, including groundwater drained through subsurface drainage systems;
- (iii) Ephemeral⁴³ features, including ephemeral streams, swales, gullies, rills, and pools;
- (iv) Diffuse stormwater run-off and directional sheet flow over upland;
- (v) Ditches that are not waters identified in Section (1)(i) or (ii) of the definition, and those portions of ditched constructed in waters identified in Section (1)(iv) of this definition that do not satisfy the definition of adjacent wetlands;
- (vi) Prior converted cropland;⁴⁴
- (vii) Artificially irrigated areas, including fields flooded for ag production, that would revert to upland⁴⁵ should application of irrigation water to that area cease;
- (viii) Artificial lakes and ponds, including water storage reservoirs and farm, irrigation,

- stock watering, and log cleaning ponds, constructed or excavated in upland or non-jurisdictional waters, so long as those artificial lakes and ponds are not impoundments of jurisdictional waters that meet the definitions of “lakes and ponds and impoundments of jurisdictional waters” discussed in section (1)(iii) above;
- (ix) Water-filled depressions constructed or excavated in upland or in non-jurisdictional waters incidental to mining or construction activity, and pits excavated in upland or non-jurisdictional waters for the purpose of obtaining fill, sand, or gravel;
- (x) Stormwater control features constructed or excavated in upland or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater runoff;
- (xi) Groundwater recharge, water reuse, and wastewater recycling structures, including detention, retention, and infiltration basins and ponds, constructed or excavated in upland or in non-jurisdictional waters; and
- (xxi) Waste treatment systems.

As was the case with the WOTUS Rule, the ink was not dry on the final NWPR when lawsuits began flooding in. Extremely broad in scope, some claim the NWPR is too narrowly written, while others claim the provisions are overly broad.⁴⁶

⁴³ “Surface water flowing or pooling only in direct response to precipitation (e.g., rain or snow fall).” *Id.* at § 328.3(c)(3).

⁴⁴ Any area that, prior to 12/23/85, was “drained or otherwise manipulated for the purpose, or having the effect, of making production” of agricultural products possible. The Navigable Waters Protection Rule: Definition of “Waters of the United States”, 85 Fed. Reg. at 22,320. Designations made by the USDA will be recognized. An area is no longer considered prior converted cropland when the area is abandoned and has reverted to wetlands. Abandonment occurs when prior converted cropland is not used for, or in support of, agricultural purposes at least once in the immediately preceding 5 years. *Id.*

⁴⁵ Any area that under normal circumstances does not satisfy all three wetland factors (hydrology, hydrophobic vegetation, hydric soils) and does not lie below the ordinary high water mark or the high tide line of a jurisdictional water. The ordinary high water mark is defined as that line on the shore established by the fluctuation of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas. The high tide line is defined as The line of intersection of the

land with the water’s surface at the maximum height reached by a rising tide. In the absence of actual data, this may be determined by a line of oil or scum along the shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line includes spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicated reach of the tide due to the piling up of water against a coast by strong winds, such as those accompanying a hurricane or other intense storm.

⁴⁶ See *Pascuq Yaqui Tribe v. U.S. Env’tl. Prot. Agency*, No. 4:20-CV-00266-RM (D. Ariz. Jun 22, 2020) (claiming NWPR is contrary to the purpose of the Clean Water Act and arbitrary and capricious because it did not analyze the scientific importance of protecting ephemeral and intermittent streams); *State of California et al v. Wheeler*, No. 3:20-CV-03005 (N.D. Cal. 2020) (several states claim NWPR fails to properly interpret Clean Water Act, fails to consider prior factual findings and fails to provide a reasoned explanation to change long-term policy); *State of California, et. al. v. Wheeler*, No. 3:20-cv-4869 (N.D. Cal. 2020) (lawsuit by California, Washington, New York, Colorado, Connecticut,

C. The Biden Administration's Approach?

The Biden Administration has yet to take action with regard to the regulatory definition of “waters of the United States.” On January 20, 2021, President Biden announced that the EPA and Department of Defense would review the NWPR.⁴⁷ Additionally, President Biden signed an Executive Order on January 20, 2021, revoking the 2017 Executive Order signed by President Trump that called for the review and reversal of the WOTUS Rule.⁴⁸ Will the Biden administration pass a Rule simply reinstating the WOTUS definition, or will the EPA and ACE undertake to promulgate their own definition? Time will tell.

III. INDIRECT DISCHARGES

Under the federal Clean Water Act Section 402, it is unlawful to discharge a pollutant from a point source into a Water of the United States without obtaining a federal permit.⁴⁹ An interesting question has arisen around the country: Is a permit required when pollutants originate from a point source, but travel through a non-point source (groundwater) to reach the Water of the United States. Put another way, is an “indirect discharge” within the scope of the Clean Water Act.

A. Applicable Definitions

The Clean Water Act defines the following

Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Virginia, Wisconsin and the District of Columbia claiming rule arbitrary and capricious in disregarding prior agency policy and failure to consider statutory objective); *State v. United States Env'tl. Prot. Agency*, 2020 WL 3402325 (D. Colo. June 19, 2020) (motion for injunction granted for Colorado finding likelihood of success on the merits arguing that *Rapanos* already foreclosed this approach because 5 justices rejected Scalia's similar definitional approach); *Env'tl. Integrity Project v. Wheeler*, No. 1:20-CV-1734 (D.D.C. June 25, 2020) (interpretation foreclosed by *Rapanos*, failure to consider relevant and important factors in drafting rule, no reasonable basis for departing from scientific evidence, prior factual findings, or policy and practice); *New Mexico Cattle Growers' Ass'n v. United States Env'tl. Prot. Agency.*, Case No. 1:19-CV-00988 (D.N.M. Oct. 22, 2019) (arguing that NWPR and 1986 definition are both too broad and advocating for definition of “waters used in commerce”); *Navajo Nation v. Wheeler*, Case No. 2:20-CV-00602-MV-GJF, Doc. #1 (D.N.M. June 22, 2020) (failure to consider impact of new rule on tribal waters and treaty rights and failure to consider whether Recession Rule and NWPR frustrate or promote the Clean Water Act's purpose); *South Carolina Coastal Conservation League v. Wheeler*, No. 2:20-CV-01687 (D.S.C. Apr. 29, 2020) (allege arbitrary and capricious reversal of policy and failure to allow meaningful opportunity to comment on rule); *Puget Soundkeeper All. v. U.S. Env'tl.*

applicable terms:

- “Pollutant” is broadly defined as: “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.”
- “Point source” is defined as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.”
- “Discharge of a pollutant” means “(A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.”

B. Cases Addressing Indirect Discharges

A circuit split arose around the country when appellate courts reached different conclusions to this

Prot. Agency, No. 2:20-CV-00950, Doc. #1 (W.D. Wash. June 22, 2020) (argue that exclusion of interstate waters, elimination of ephemeral waters under the definition of tributaries, and other various changes in the 2020 WOTUS Rule, the Plaintiffs assert the 2020 rule is contrary to the Clean Water Act and that action was arbitrary and capricious for failure to explain change in position); *Washington Cattlemen's Ass'n v. U.S. Env'tl. Prot. Agency*, No. 2:19-CV-00569-JCC (W.D. Wash. April 16, 2019) (amended complaint filed challenging 2020 Rule's regulation of all intermittent tributaries, non-navigable perennial tributaries, and non-navigable lakes and ponds, and non-abutting wetlands); *Oregon Cattlemen's Ass'n v. U.S. Env'tl. Prot. Agency*, No. 3:19-cv-00564-AC (D. Or. June 8, 2020) (seeking to enjoin application of intermittent tributary and non-abutting wetlands provisions); *Riverkeeper, Inc. v. Wheeler*, No. 17-cv-4916-VSB (S.D. N.Y. June 29, 2017) (violates Clean Water Act); *Chesapeake Bay Found., Inc. v. Wheeler*, (D. Md., April 27, 2020) (violations of APA and notice and comment rulemaking for changing agency direction); *Conservation Law Found. v. U.S. Env'tl. Prot. Agency*, No. 20-cv-10820-DPW (D. Mass. Apr. 29, 2020) (arbitrary and capricious, violates Clean Water Act, violates Endangered Species Act).

⁴⁷ Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan 21, 2021).

⁴⁸ 33 U.S.C. § 1342 (2019).

⁴⁹ 40 C.F.R. § 122.2.

question.

1. *Hawaii Wildlife Fund v. County of Maui*⁵⁰

The County of Maui has wastewater facility wells disposing sewage (effluent) into groundwater and eventually into the Pacific Ocean. All parties agree that once the effluent is injected into the groundwater, some of it eventually reaches the Pacific Ocean. This conclusion was confirmed by various studies, including one conducted in 2013 using tracer dye to determine when and where the effluent disposed of in the wells took to reach the Pacific.

The Hawaii Wildlife Fund filed suit and the trial court found that the County of Maui violated the Clean Water Act by discharging effluent into groundwater and into the Ocean without the required NPDES permit. The trial court also held that groundwater was a Water of the United States and a permit was required. The County appealed to the United States Court of Appeal for the Ninth Circuit.

The Ninth Circuit upheld the trial court decision. The Court easily found that the effluent was a pollutant and that the wells constitute a “point source” discharge. The court “assumed without deciding” that groundwater was neither a point source discharge, nor a Water of the United States. The critical issue in the case became whether the Clean Water Act applies only where the pollutant is discharged *directly* into a Water of the United States, or whether it applies where a pollutant is discharged into groundwater and then *indirectly* makes its way into a Water of the United States.

The Court held that pollutants from a point source ended up in a Water of the United States, a permit was required, regardless of the fact that it travels through groundwater as a channel to reach the jurisdictional water. Thus, because the County (1) discharged pollutants from a point source, (2) the pollutants are “fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water,” and (3) the pollutant levels reaching the navigable water are more than *de minimus*, the Clean Water Act does apply and a NPDES permit was required.

As discussed below, this case was appealed to and certiorari accepted by the United States Supreme Court.

2. *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*⁵¹

When a pipeline rupture caused gasoline to seep into nearby groundwater, conservation groups brought suit alleging that the gasoline traveled an additional 1,000 feet into “navigable waters” and, thus, the pipeline

company violated the CWA by making an unpermitted discharge. Kinder Morgan moved to dismiss the case and the trial court did just that, finding that the CWA did not apply to such indirect discharges of pollutants into groundwater.

On appeal, the Fourth Circuit reversed, finding that the CWA did not limit discharges only to those made “directly” into a navigable water. “We hold...that to qualify as a discharge of a pollutant under the CWA, that discharge need not be channeled by a point source until it reaches navigable waters.” The court then limited such discharges to which the CWA would apply to those that were “sufficiently connected to navigable waters.” This requires a fact-based analysis of hydrological connectivity, looking at the time, distance, geology, flow, and scope of the discharge. Here, the allegations of pollutants seeping into groundwater only 1,000 feet from the ruptured pipeline, plus evidence that it was gasoline from the pipeline found in the navigable water was sufficient evidence to state a claim and allow the case to proceed.

Kinder Morgan filed a Petition for Certiorari with the United States Supreme Court, which was granted, but then vacated and remanded for further consideration in light of the Court’s decision in *County of Maui v. Hawaii Wildlife Fund*.

3. *Sierra Club v. Virginia Electric & Power Co.*⁵²

This case involves a coal-fired power plant. Plaintiffs allege that the coal ash ponds violated the CWA because, without a permit, they polluted the groundwater near the plant and, eventually, the pollutants reached the Elizabeth River and Deep Creek. The trial court, following a bench trial, sided with the plaintiffs, finding that the CWA did cover discharges into groundwater that had a “direct hydrological connection” to navigable waters such that the pollutant would reach these jurisdictional waters. The defendants appealed.

Applying their decision in *Upstate Forever*, the Fourth Circuit affirmed the trial court’s ruling that indirect discharges of pollutants that eventually reach navigable waters may be governed by the Clean Water Act where a direct hydrological connection between the groundwater and navigable water can be shown. Because the trial court found a hydrological connection, and the defendants did not challenge that on appeal, the court affirmed this portion of the decision.

However, the court went on to address the issue of whether each settling pond constituted a “point source.” The Fourth Circuit found that the ponds were not point sources. “We conclude that while arsenic from the coal ash stored on defendants site was found to

⁵⁰ 886 F.3d 737 (9th Cir 2018).

⁵¹ 887 F.3d 637 (4th Cir. 2018)

⁵² 903 F.3d 403 (4th Cir. 2018).

have reached navigable waters—having been leached from the coal ash by rain water and groundwater and ultimately carried by groundwater into navigable waters—that simple causal link does not fulfill the CWA’s requirement that the discharge be from a point source.” Thus, the Fourth Circuit found the CWA inapplicable to this case and reversed the trial court’s verdict.

Thus, this case essentially held that an indirect discharge from a point source into groundwater could require a NPDES permit, that was not the situation in this case because the coal ash ponds were not a point source as required by the CWA.

4. Kentucky Waterways All. v. Kentucky Utilities Co.⁵³

A coal-fired power plant generates coal combustion residuals of fly ash and bottom ash as a result of its coal-burning processes. Historically, the residuals were disposed of by transport through a sluice system to settling ponds. The Sierra Club claims that the plant’s settling ponds are contaminating groundwater in the area and that the contaminated groundwater was discharging via spring into Herrington Lake. They filed a citizen suit against the plant based, in part, on an alleged violation of the Clean Water Act, claiming that the plant is discharging pollutants, which have seeped from the ponds into the groundwater which emerges from springs and discharges into Herrington Lake, a Water of the United States, without a permit.

The plant filed a Motion to Dismiss the Clean Water Act claims because the Sierra Club did not allege that “pollutants are conveyed *directly*” from the ponds to the navigable waters and that the pollution is non-point source, which is not governed by the Clean Water Act. The plaintiffs responded that their allegation that the groundwater is hydrologically connected to the Water of the United States was sufficient to state a claim.

The US Court of Appeals for the Eastern District of Kentucky sided with the plaintiff and dismissed the case. In analyzing the issue, the Court noted that the Plaintiffs do not argue the groundwater itself is a WOTUS and the Court said that was “with good reason” as the vast majority of courts to consider this issue have rejected that argument. With regard to the issue of whether groundwater meets the definition of a point source, the Court found that it did not and stated that “adopting this theory would be inconsistent with the text and structure of the Clean Water Act.”

5. Tennessee Clean Water Network v. Tennessee Valley Authority⁵⁴

Yet again, this case involves a coal-fired power plant in Tennessee that allegedly discharges pollutants from coal ash ponds into groundwater, and eventually into the Cumberland River. After a trial, the court found that the defendant did violate the CWA because, without a required permit, the coal ash ponds discharged pollutants through groundwater that is hydrologically connected to the Cumberland River.

The Sixth Circuit reversed, stating that it “found no support for this theory in either the text or history of the CWA and related environmental laws.” Thus, “for a point source to discharge into navigable waters, it must dump directly into those navigable waters.” Thus, the trial court decision was reversed with regard to liability under the Clean Water Act.

6. Prairie Rivers Network v. Dynegy Midwest Generation, LLC⁵⁵

This trial level case is the most recent decision addressing this issue. Here, another coal-fired power plant’s coal ash ponds were at issue. Plaintiffs claim that groundwater monitoring indicates that pollutants including boron and sulfate have been seeping from the pond into the groundwater and, eventually, into the Middle Fork River. The plaintiffs allege that the plant is discharging pollutants without the required NPDES permit.

The trial court sided with the defendants. Relying on *Village of Oconomowoc Lake v. Dayton*, a case addressing this issue decided by the 7th Circuit in 1994, the trial court in *Prairie River* held that discharges of pollutants into groundwater were not covered by the Clean Water Act. Specifically, the *Oconomowoc* court stated “neither the Clean Water Act nor the EPA’s definition asserts authority over groundwater, just because these may be hydrologically connected with surface waters.” Based on this binding precedent, the trial court in *Prairie Rivers* held that “discharged from artificial ponds into groundwater are not government by the CWA, even if there is an alleged hydrological connection between the groundwater and surface waters qualifying as ‘navigable waters’ of the United States.”

7. Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc.⁵⁶

Plaintiffs allege pollutants seeped from the ponds into groundwater and eventually reached nearby Sutton Lake. The trial court found that “Congress did not intend for the CWA to extend federal regulatory authority over groundwater, regardless of whether that groundwater is eventually or somehow ‘hydrologically

⁵³ 905 F.3d 925 (6th Cir. 2018).

⁵⁴ 905 F.3d 436 (6th Cir. 2018).

⁵⁵ No. 18-CV-2148 (C. D. Ill. Nov. 14, 2018).

⁵⁶ 25 F.Supp.3d 798 (E.D.N.C. 2014).

connected' to navigable surface waters." Thus, the claims related to discharges through groundwater were dismissed.

C. County of Maui v. Hawaii Wildlife Fund: Functional Equivalent Test

The facts and procedural history of this case were discussed above. Justice Breyer delivered the Court's Opinion and was joined in the majority by Justices Ginsburg, Kagan, Sotomayor, Roberts, and Kavanaugh.

The Opinion initially notes the linguistic question in the case is really the meaning of the word "from" as used in the statutory definition of "discharge of a pollutant:" "any addition of any pollutant to navigable waters *from* any point source."

1. Summary of Parties Arguments

The Court then summarizes the arguments of the parties. The environmental groups essentially adopted the 9th Circuit "fairly traceable" test, arguing that if a point source discharge reaches a navigable water, even if it traveled "long and far through groundwater," it would be subject to the Act's requirements. Conversely, the County argued for a bright-line "means of delivering pollutants" test whereby a pollutant is deemed "from" a point source only if that point source is "the last conveyance that conducted the pollutant to navigable waters." The Solicitor General, on behalf of the Environmental Protection Agency, argued that the release of pollutants into groundwater is not subject to the Clean Water Act, regardless of subsequent migrations into jurisdictional water.

The Court states the correct meaning of "from" lies somewhere in the middle of the parties' approaches. "We agree that the statutory context limits the reach of the statutory phrase 'from any point source' to a range of circumstances narrower than that which the Ninth Circuit's interpretation suggests. At the same time, it is significantly broader than the total exclusion of all discharges through groundwater described by Maui and the Solicitor General."

In responding to the Ninth Circuit's "fairly traceable" test, the Court notes that eventually virtually all water makes its way to a WOTUS and the power of modern technology allows tracing back over great distances, many years, and even in highly diluted forms. Interpreting "from" this broadly is inconsistent with the Clean Water Act's purpose, the Court reasons, noting that under this test, even pollutants carried to WOTUS on a bird's feathers or the 100-year migration of pollutants through 250 miles of groundwater could be jurisdictional. Additionally, the Clean Water Act intended that the responsibility for regulating groundwater and non-point source pollution be left to the states. This, the Court reasons, indicates Congress

did not intend such a broad definition of the word "from." Legislative history also points to a narrower view of the Act as Congress expressly rejected requests to extend the permitting requirement to groundwater. Lastly, the Court notes that although the EPA has applied the permitting requirement to discharges that travel through groundwater, it has done so in a more limited fashion than the "fairly traceable" test, in particular rejecting application where there was a long time period between the discharge being made into the groundwater and reaching the WOTUS.

Next, the Court turns to the County's arguments, deeming them "too narrow" and noting its proposed test could "risk serious interference with EPA's ability to regulate ordinary point source discharges." The court referenced the hypothetical of a pipe spewing pollutants directly into coastal waters. If the County's test were adopted and any amount of groundwater between the pipe and the waters allowed the owner to avoid jurisdiction, why would he not move the end of the pipe back a few yards so that the pollution traveled through at least some groundwater to evade the permitting requirement?

Then, the Court addresses the Solicitor General's arguments, which reflect the EPA's recent Interpretive Statement that the Act excludes "all releases of pollutants to groundwater." The Court notes that neither party requested *Chevron* deference be given to this Interpretive Statement, but the Court does indicate it "pays particular attention to an agency's views in light of the agency's expertise in a given area, its knowledge gained through practical experience, and its familiarity with the interpretive demands of administrative need." Even with that attention, the Court found the EPA's determination would "open a loophole allowing easy evasion of the statutory provision's basic purposes."

2. Functional Equivalent Test Announced

The Court, instead, adopts a "functional equivalent" test. "We hold that the statute requires a permit when there is a direct discharge from a point source into navigable waters or when there is the *functional equivalent of a direct discharge*." In other words, a permit is required when a "point source directly deposits pollutants into navigable waters, or when the discharge reaches the same result though roughly similar means."

By way of example, the Court stated that "where a pipe ends a few feet from navigable waters and the pipe emits pollutants that travel those few feet through groundwater (or over the beach), the permitting requirement clearly applies. If the pipe ends 50 miles from navigable waters and the pipe emits pollutants that travel with groundwater, mix with much other material,

and end up in navigable waters only many years later, the permitting requirements likely do not apply.”

The Court recognizes the difficulty with this approach being how to deal with the “middle instances.” The Court identifies seven factors that could potentially be considered depending on the circumstances of the specific case: (1) transit time; (2) distance traveled; (3) the nature of the material through which the pollutant travels; (4) the extent to which the pollutant is diluted or chemically changes as it travels; (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source; (6) the manner by or area in which the pollutant enters the navigable waters; and (7) the degree to which the pollution (at that point) has maintained its specific identity. The Court believes that time and distance will be the most important factors in most, but not necessarily all, cases.

The Court expects that the judiciary can provide guidance through decisions in individual cases, noting that those lower court decisions “should not create serious risks either of undermining state regulation of groundwater or of creating loopholes that undermine the statute’s basic federal regulatory objectives.” The EPA can provide administrative guidance as well through its permitting options and general rulemaking.

3. Response to Dissenting Opinions

The Court also responds to criticisms contained in the dissenting opinions.

The majority believes that there is no linguistic basis to limit the word “from” to mean only the pollutant’s immediate origin. Justice Thomas argues that in a case of discharge through groundwater, the pollutants came from the groundwater. The majority argues that does not mean it did not also come from the point source. The Court offers an example of a traveler arriving at a hotel. He came from a train station, from Baltimore, from Europe. He came from all three. Thus, a sign instructing anyone arriving from Baltimore to speak to the desk clerk would include the traveler, even though he immediately came from the train station. Additional examples involving gravy and baths are used to illustrate this principle as well.

Thus, the Ninth Circuit opinion was vacated, and the case remanded for further action consistent with this Opinion. There were several concurring and dissenting opinions filed, which are not included as part of this paper.

IV. CLEAN WATER ACT APPLICABILITY TO AIR POLLUTANTS

Last month, a circuit court judge in Montgomery County reversed the Maryland Department of the

Environment’s (“DOE”) final 2020 Animal Feeding Operation Discharge Permit for not considering ammonia emission discharges into the air as a pollutant into water since the ammonia discharges could fall into waters covered by the Clean Water Act. Although this is a trial court case in Maryland, it has potential impacts across the nation, meriting discussion in this paper.

A. Background

The Maryland DOE began work on reissuing the AFO discharge permit in 2019 and allowed for public comment. Assateague Coastal Trust (“ACT”) provided comments related to gaseous ammonia discharge from concentrated animal feeding operations, or CAFOs. Specifically, ACT had concerns that the permit did not adequately address air pollution discharges, including ammonia, from exhaust fans and manure storage areas into the air and onto surface waters.

The DOE responded to this concern by pointing out that EPA did not regulate odors and air quality through the Clean Water Act’s permitting program. Because the DOE derives its authority delegated from the EPA, it also refused to take odors and air quality into account. The DOE issued the final permit last July with no limitations on ammonia emissions.

ACT filed a petition for judicial review of the final AFO permit for not limiting ammonia discharges.

B. Trial Court Decision

The circuit court judge in this case decided that the Maryland General Assembly broadened the Clean Water Act’s reach with water quality legislation that provided additional remedies for the state’s waters.

Included in this expansive view was the use of the word “emit” by the General Assembly in the definition of discharge. Looking at the dictionary definition of “emit,” the court determined it included gaseous emissions such as ammonia from a poultry fan in a gaseous state.

The DOE argued that using this interpretation would broaden the existing law and require it to regulate chimneys and cars for potential gas discharges that would hit the waters in the state.

The DOE cited a federal case — *Chemical Weapons Working Group Inc. v. U.S. Department of the Army*⁵⁷ — where a group argued that pollution caused by incinerating chemical weapons would fall on land in Clean Water Act-covered waterways, thus requiring the Army to receive a discharge permit first. The 10th Circuit Court of Appeals refused to construe the Clean Water Act to require a permit for air emissions.

The circuit court judge disagreed that the decision supported the DOE’s argument because congressional action authorized chemical weapons incineration. The

⁵⁷ 25 F.Supp.3d 798 (E.D.N.C. 2014) .

General Assembly did not provide similar authorizations to allow ammonia discharges.

The judge ruled that burning chemical weapons was a one-time event, and thus possible Clean Water Act violations were insubstantial compared to potential repeated violations by the AFOs.

The circuit court ruled that the DOE erred as a matter of law by not including gaseous ammonia emissions and reversed the AFO permit's final determination.

The DOE has announced it will appeal this decision.

C. Potential Impact

Although this is only a trial court decision from Maryland, which will be appealed, it signals more pressing issues of which Texas livestock producers and agricultural attorneys should be aware. This is hardly the first time environmental groups have turned to the Courts to seek to achieve air emissions regulations for CAFOs. Recall that in 2017, the United States Court of Appeals for the District of Columbia held that CAFOs would be required to report air emissions from animal waste.⁵⁸ Although that issue was quelled by Congress passing the Fair Agricultural Reporting Act in 2018, which expressly exempted air emissions from animal waste at a farm from reporting under CERCLA. Because of this express exemption from CERCLA reporting, the EPA concluded based on EPCRA Section 304, reporting is not required under EPCRA. So, although the Maryland decision may seem insignificant for now, it may well be that this issue will once again arise, albeit under the guise of the Clean Water Act this time.

V. CONCLUSION

As the discussion above indicates, there are a multitude of legal challenges surrounding the Clean Water Act. Perhaps the only certainty that exists is the promise of more litigation in the future.

⁵⁸ *Waterkeeper Alliance v. Environmental Protection Agency*, 853 F.3d 527 (D.C. Cir. 2017).

