

**THE CREATURE FROM THE POTOMAC BASIN:  
ENVIRONMENTAL LAW UNDER THE TRUMP ADMINISTRATION**

*Presented by:*

**SHANNON FERRELL**, *Stillwater, OK*  
Assistant Professor  
Agricultural Economics  
Oklahoma State University

*Co-authors:*

**PAUL GOERINGER**, *College Park*  
Extension Legal Specialist  
University of Maryland  
Department of Agricultural and Resource Economics

**TIFFANY DOWELL LASHMET**, *Amarillo*  
Assistant Professor and Extension Specialist, Agricultural Law  
Texas A&M AgriLife Extension Service

State Bar of Texas  
**11<sup>th</sup> ANNUAL**  
**JOHN HUFFAKER AGRICULTURAL LAW COURSE**  
May 25-26, 2017  
Lubbock

**CHAPTER 14**



**Shannon L. Ferrell, Esq., J.D.**

Assistant Professor, Agricultural Law  
Oklahoma State University Department of Agricultural Economics  
532 Agricultural Hall  
Stillwater, OK 74078  
[shannon.l.ferrell@okstate.edu](mailto:shannon.l.ferrell@okstate.edu)

Dr. Shannon Ferrell grew up on a small wheat and cattle operation near Leedey, Oklahoma. He attended Oklahoma State University, where he obtained his Bachelor of Science degree with honors in Agribusiness and his Master of Science Degree in Agricultural Economics. He then attended Oklahoma City University where he obtained his J.D. *summa cum laude* and received a certificate in Business and Financial Services law and an endorsement in estate planning.

Professor Ferrell has been a practicing attorney for fourteen years, and focuses on agricultural law with a particular emphasis on energy, environmental, and estate planning issues. Since joining Oklahoma State University, he has provided over 350 seminars and workshops to a cumulative audience over 20,500 and has authored a number of publications and seven handbooks in the area, including serving as lead author for the recently released “Environmental Regulatory Compliance for Farmers and Ranchers.” Professor Ferrell has received awards at the regional and national levels for both his teaching and Extension programming. He also serves as Governor Fallin’s appointed agriculture industry representative on the Oklahoma Environmental Quality Board, which oversees the operation of the Oklahoma Department of Environmental Quality.



**Paul Goeringer, Esq., J.D.**

Extension Legal Specialist  
University of Maryland Department of Agricultural and Resource Economics  
2200 Symons Hall  
College Park, MD 20742  
[logering@umd.edu](mailto:logering@umd.edu)

Paul Goeringer is the Extension Legal Specialist at the University of Maryland. 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 a 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 an active member of the American Agricultural Law Association, Agriculture Law Section of the Maryland State Bar Association, and Southern Agricultural Economics Association and a member of the Agricultural & Applied Economics Association.



**Tiffany Dowell Lashmet, Esq., J.D.**

Assistant Professor and Extension Specialist, Agricultural Law  
Texas A&M AgriLife Extension Service  
6500 Amarillo Boulevard West  
Amarillo, Texas  
[tdowell@tamu.edu](mailto:tdowell@tamu.edu)

Tiffany Dowell Lashmet has served as an Agricultural Law Specialist for Texas A&M AgriLife Extension Service since 2013. Tiffany's work focuses on legal issues impacting Texas landowners and agricultural producers including leases, water law, oil and gas law, pipeline easement negotiation, and landowner liability. She travels the state speaking at various meetings and conferences on these issues and has published several law review articles, extension fact sheets, magazine articles, and newspaper articles on these topics. She also authors the award-winning Texas Agriculture Law Blog, recognized as one of the Top 100 Legal Blogs in the nation by the American Bar Association in 2014. Tiffany is licensed to practice law in Texas and New Mexico. She grew up on her family's farm and ranch in Northeastern New Mexico, between Tucumcari and Logan.





**TABLE OF CONTENTS**

ABSTRACT..... 1

I. THE TRUMP ADMINISTRATION’S ENVIRONMENTAL FRAMEWORK..... 1

    A. Early regulatory reforms under President Trump and 115<sup>th</sup> Congress ..... 1

    B. The Trump administration’s environmental appointments ..... 1

        1. Administrator of the U.S. Environmental Protection Agency Scott Pruitt ..... 1

        2. Secretary of Energy Rick Perry ..... 4

        3. Secretary of Agriculture Sonny Perdue ..... 5

        4. Secretary of the Interior Ryan Zinke ..... 5

    C. The Supreme Court and Justice Gorsuch ..... 6

II. WATER..... 7

    A. Background for the Waters of the United States (WOTUS) Rule..... 7

    B. Efforts to clarify a definition of “waters of the United States ..... 8

    C. Trump Administration efforts on WOTUS and pending developments..... 9

III. AIR..... 10

    A. Executive Order 13783 and the “end of the war on coal” ..... 10

    B. CERCLA and EPRCA reporting ..... 11

IV. LAND..... 12

V. CONCLUSIONS..... 12



## THE CREATURE FROM THE POTOMAC BASIN: ENVIRONMENTAL LAW UNDER THE TRUMP ADMINISTRATION

### ABSTRACT

The Trump Administration's campaign promise to "make America energy dependent [and] create millions of new jobs" has motivated a number of important regulatory, legislative, and judicial developments in the first 100 days. President Trump's executive appointments show a strong theme of reducing regulation and agency scope, while his appointment of Justice Gorsuch shows a desire to replace the textualism and restraint of past Justice Scalia. Nevertheless, a number of legislative and litigation matters may check the President's efforts at environmental reforms.

### I. THE TRUMP ADMINISTRATION'S ENVIRONMENTAL FRAMEWORK

#### A. Early regulatory reforms under President Trump and 115<sup>th</sup> Congress

Interestingly (and perhaps tellingly, depending on the perspective of the observer), then-candidate Trump's presidential platform had no environmental plank. The closest piece of the platform to an environmental policy was this:

Make America energy independent, create millions of new jobs, and protect clean air and clean water. We will conserve our natural habitats, reserves and resources. We will unleash an energy revolution that will bring vast new wealth to our country.

During his campaign, President Trump made numerous references to his concerns that excessive regulations were costing U.S. jobs. He made particular note of environmental regulations, with a principal example being his description of a "war on coal" under President Obama's climate regulations.<sup>1</sup> Thus, a primary focus in the early days of President Trump's administration has been regulatory reform with an emphasis on environmental regulations.

<sup>1</sup> Valerie Volcovici, Nichola Groom and Scott DiSavino, "Trump Declares end to 'War on Coal' but Utilities Aren't Listening." Reuters, April 5, 2017, <http://www.reuters.com/article/us-usa-trump-climate-power-idUSKBN1770D8> (last accessed May 15, 2017).

<sup>2</sup> Executive Order 13777, "Presidential Executive Order on Enforcing the Regulatory Reform Agenda." February 24, 2017. <https://www.whitehouse.gov/the-press-office/2017/02/24/presidential-executive-order-enforcing-regulatory-reform-agenda> (last accessed May 15, 2017).

<sup>3</sup> 5 U.S.C. § 802.

<sup>4</sup> H.J.R. 38 (2017).

One of President Trump's first steps toward regulatory reform was a requirement that federal agencies appoint a regulatory reform officer.<sup>2</sup> This was a follow up to Executive Order 13771, which required agencies to eliminate two old regulations for each new regulation.

Emboldened by holding the Presidency, Senate, and House, Congress turned to a little-known and heretofore little-used law – the Congressional Review Act ("CRA," 5 U.S.C. §§ 801 – 808). Under the CRA, Congress can pass a joint resolution (with a simple majority in both houses) disapproving an administrative rule within 60 days of Congress' receipt of the rule report (required under section 801 of the CRA).<sup>3</sup> The short window means Congress would be limited to the number of regulations it could directly revoke under the CRA, and that those regulations would be largely limited to the so-called "midnight regulations" enacted in the final days of the Obama administration. Nevertheless, in one of its first CRA actions, Congress passed a resolution to overturn the Office of Surface Mining's Stream Protection Rule with the resolution signed by President Trump on February 16, 2017.<sup>4</sup>

#### B. The Trump administration's environmental appointments

While the CRA provided Congress with a short route to changing some of the environmental regulations promulgated through the Executive Branch, the "longer haul" changes in environmental policy and law will likely come through the agencies with environmental responsibilities, led by their respective Trump-appointed heads.

##### 1. Administrator of the U.S. Environmental Protection Agency Scott Pruitt

Scott Pruitt was announced as the nominee for Administrator on December 7, 2016<sup>5</sup> and was confirmed on a 52-46 vote by the Senate on February 17, 2017.<sup>6</sup>

Although Pruitt grew up in Kentucky and graduated from Georgetown College with degrees in political science and communications, he later moved to Oklahoma where he graduated from the University of Tulsa with his juris doctorate.<sup>7</sup> After five years of

<sup>5</sup> Reuters, "Trump to Pick Foe of Obama Climate Agenda to Run EPA." December 7, 2016, <http://www.reuters.com/article/us-usa-trump-epa-idUSKBN13W2HE> (last accessed May 13, 2017).

<sup>6</sup> CNN, "Scott Pruitt Confirmed to EPA." February 17, 2017, <http://www.cnn.com/2017/02/17/politics/senate-epa-scott-pruitt/> (last accessed May 13, 2017).

<sup>7</sup> LawStreet, "The Trump Cabinet: Who is Scott Pruitt?" December 8, 2016, <https://lawstreetmedia.com/blogs/politics-blog/the-trump-cabinet-scott-pruitt/> (last accessed May 13, 2017).

private practice, Pruitt was elected as an Oklahoma state senator, eventually becoming the state's Attorney General in 2010 – the position he held until his appointment by President Trump in 2017.

Pruitt was one of President Trump's most controversial appointments overall, and almost certainly the most contentious nomination for a post with environmental responsibilities. First, opponents of Pruitt's appointment believed he was too closely tied to the oil and gas industry, noting multi-million contributions made by the oil and gas industry to the Republican Attorneys General Association which Pruitt led.<sup>8</sup> Second, opponents cited his stance on anthropogenic (man-caused) climate change: "I think that measuring with precision human activity on the climate is something very challenging to do and there's tremendous disagreement about the degree of impact, so, no, I would not agree that it's a primary contributor to the global warming that we see."<sup>9</sup> As Oklahoma Attorney General, Pruitt initiated or joined four separate challenges to the federal Clean Power Plan, the regulatory centerpiece of the Obama Administration climate change regulations.

A third criticism was Pruitt's lack of experience in either environmental science or leadership of environmental agencies. On this point, it may be interesting to note one of the groups lobbying against Pruitt's confirmation was the EPA employees' labor union.<sup>10</sup> Pruitt does not have an academic or professional background in environmental science and has not overseen any environmental agencies in his political career. Perhaps ironically, he promptly dissolved the one governmental unit he did supervise with environmental enforcement responsibilities – the Environmental Protection Unit of the Oklahoma Attorney General's office (assigning environmental responsibilities formerly handled by the unit to the office of the Oklahoma Solicitor General) – and created a "Federalism Unit" aimed at combating what he characterized as overreaching regulation by the federal government.<sup>11</sup> Indeed, in his capacity as Oklahoma Attorney General, Pruitt sued the EPA 14 times,

including cases protesting the implementation of the following regulations:<sup>12</sup>

- 1) The Cross-State Air Pollution Rule (CSAPR)(regulating electrical utility generation unit emissions of sulfur dioxide and nitrogen oxides affecting downwind states)
- 2) The Mercury and Air Toxics Standards (MATS)(air emissions of mercury, arsenic, and other air pollutants)
- 3) Second challenge, MATS rule
- 4) Revision of the National Ambient Air Quality Standards (NAAQS) for ground level ozone
- 5) EPA regulations for emissions from electrical power plants during startup, shutdown, and malfunction events
- 6) Regional Haze Rule (requirements for visibility improvement in national parks and wilderness areas)
- 7) New Source Performance Standards (NSPS) for greenhouse gas (GHG) and volatile organic compound (VOC) emissions from oil and natural gas drilling and production sites
- 8) EPA's determination that GHG pollution endangers human health and the environment (also known as EPA's GHG "endangerment finding")
- 9) The federal Clean Power Plan (reduction of carbon dioxide emissions from electrical utility generating units)
- 10) Second challenge, Clean Power Plan
- 11) Third challenge, Clean Power Plan
- 12) Fourth challenge, Clean Power Plan
- 13) NSPS for carbon dioxide emissions electric utility generating units (EGUs)
- 14) The Waters of the United States (WOTUS) rule (defining water bodies under jurisdiction of the federal Clean Water Act)

There are at least two sides to every political issue, though, and in this case, every reason cited by Pruitt's opponents as to why "Pruitt personified 'the worst cabinet, I think, in the history of America,'"<sup>13</sup> has been

<sup>8</sup> Eric Lipton and Coral Davenport, "Scott Pruitt, Trump's E.P.A. Pick, Backed Industry Donors over Regulators." *NEW YORK TIMES*, January 14, 2017, available at <https://www.nytimes.com/2017/01/14/us/scott-pruitt-trump-epa-pick.html> (last accessed May 13, 2017).

<sup>9</sup> Coral Davenport, "E.P.A. Chief Doubts Consensus View of Climate Change." *NEW YORK TIMES*, March 9, 2017, available at <https://www.nytimes.com/2017/03/09/us/politics/epa-scott-pruitt-global-warming.html> (last accessed May 14, 2017).

<sup>10</sup> CNN, *supra* note 6.

<sup>11</sup> Brady Dennis and David Weigel, Washington Post, "EPA Nominee Scott Pruitt Won't Say if he would Recuse Himself from his Own Lawsuits Against the Agency." January 18,

2017, [https://www.washingtonpost.com/national/health-science/can-the-epas-main-antagonist-become-its-next-leader/2017/01/17/d24308ca-dcf7-11e6-ad42-f3375f271c9c\\_story.html?utm\\_term=.67dd3f9aaf57](https://www.washingtonpost.com/national/health-science/can-the-epas-main-antagonist-become-its-next-leader/2017/01/17/d24308ca-dcf7-11e6-ad42-f3375f271c9c_story.html?utm_term=.67dd3f9aaf57) (last accessed May 13, 2017).

<sup>12</sup> "Pruitt v. EPA: 14 Challenges of EPA Rules by the Oklahoma Attorney General," *New York Times* (undated). <https://www.nytimes.com/interactive/2017/01/14/us/politics/document-Pruitt-v-EPA-a-Compilation-of-Oklahoma-14.html> (last accessed May 13, 2017).

<sup>13</sup> Evan Halper, "After Bruising Battle, Climate Change Skeptic Scott Pruitt Confirmed to Lead EPA." *LOS ANGELES TIMES*, February 17, 2017, available at <http://www.latimes.com/politics/la-na-pol-trump-epa-pruitt->

cited by his supporters as precisely why he was “exactly the right person with the right qualifications and the right emphasis to fix [EPA].”<sup>14</sup> His supporters have noted that his ability to work cooperatively with industry is crucial to economic growth, and those who believe climate regulation has unfairly hampered U.S. industry also believe Pruitt’s tack on climate issues represent the correct approach. Indeed, two Democrats “crossed the aisle” to support Pruitt, driven largely by the importance of the coal industry in their respective states: Joe Manchin III of West Virginia and Heidi Heitkamp of North Dakota (though it should also be noted that one Republican voted against Pruitt’s confirmation: Susan Collins of Maine).

Finally, many who believe EPA had grown unchecked for years applaud Pruitt’s efforts to “hold the agency accountable,” as evidenced by the comments of Senator Sullivan from Alaska:

We’ve had an agency in the EPA that doesn’t listen to states, even though it’s required to by federal law; that ignores the rule of law as evidenced by numerous federal court decisions rebuking it; and that believes it has the power to regulate every nook and cranny of American life... Millions of Americans, including some of my constituents in Alaska, have come to fear their own federal government...<sup>15</sup>

Similarly, Oklahoma Senator James Inhofe noted Pruitt’s penchant for seeking balanced federalism in his statement on the nomination:

“Scott Pruitt is the ideal candidate to lead the EPA... [he] has seen first-hand the abuses of power at the hands of this agency and has fought back to ensure environmental quality without sacrificing jobs. Scott is an expert in constitutional law, and understands the fundamental element of balance necessary

between the states and the federal government.”<sup>16</sup>

Other senators pointed out the stay of the Clean Power Plan rules by the Supreme Court in *West Virginia v. EPA*<sup>17</sup> and the stay of the hotly-contested “Waters of the United States” rule (the “WOTUS” rule, alternatively called the Clean Water Rule by EPA) by the Sixth Circuit Court of Appeals<sup>18</sup> as examples of courts’ recognition that EPA had overstepped its bounds with regulations and that it was time to “put the brakes” on EPA’s regulatory agenda. Others noted the 31 suits filed by states against the WOTUS rule<sup>19</sup> reflected a trend by EPA and the federal government in general to impose federal will in areas where states should have authority. Pruitt’s history of state challenges against federal regulation positions him as a potential champion to those who believe EPA need serious curtailment.

Still, “state’s rights” can cut both ways, too. California in particular has been concerned Pruitt’s climate views jeopardize the waiver granted it allowing it to enact more stringent emissions standards than those at the federal level. Asked in confirmation hearings if he would leave the waiver in place, Pruitt responded “I don’t know without going through the process to determine that. One would not want to presume the outcome.”<sup>20</sup> Pruitt’s stance on states’ ability to regulate environmental issues holds implications not only for climate issues, but for a host of other environmental concerns including regulation of oil and gas production. While many states have fought battles internally over whether municipalities, counties, or states should hold the power to regulate oil and gas activity, there also looms the question of whether states should have the power to regulate that activity more stringently than federal regulations as well.

In short, Pruitt’s tenure as EPA Administrator will likely see a significant swing away from Obama administration efforts to expand the agency’s jurisdictional reach toward a smaller agency with a narrower scope of regulatory proposals. Conversely, there will likely be increased legislative and litigation

---

[20180217-story.html](#) (last accessed May 14, 2017), quoting Senator Charles Schumer (D – New York).

<sup>14</sup> Halper, *supra* note 13, quoting Senator Daniel Sullivan (R – Alaska).

<sup>15</sup> Halper, *supra* note 13.

<sup>16</sup> Office of James M. Inhofe, “Inhofe Statement on Meeting with Scott Pruitt, Nominee for EPA Administrator.” January 3, 2017, <https://www.inhofe.senate.gov/newsroom/press-releases/inhofe-statement-on-meeting-with-scott-pruitt-nominee-for-epa-administrator-> (last accessed May 14, 2017).

<sup>17</sup> U.S. Supreme Court, order in pending case 15A773 (order issued February 9, 2017).

<sup>18</sup> *In re: Environmental Protection Agency and Department of Defense Final Rule; “Clean Water Rule: Definition of Waters of the United States,”* U.S. Court of Appeals for the Sixth Circuit, Case Nos. 15-3799/3822/3853/3887 (October 9, 2015).

<sup>19</sup> Peggy Kirk Hall, “Sixth Circuit Court of Appeals will Hear Challenge to WOTUS Rule.” Ohio State University Agricultural Law and Taxation Blog, February 23, 2016, <https://aglaw.osu.edu/blog-tags/waters-united-states>.

<sup>20</sup> Evan Halper, “Trump’s EPA Pick Casts Doubt on California’s Power to Regulate Auto Emissions.” LOS ANGELES TIMES, January 18, 2017, <http://www.latimes.com/nation/la-na-pol-epa-confirmation-20170118-story.html> (last accessed May 14, 2017).

pressures from environmental groups to advance the agency's regulation of water and air issues. Specifically, the Trump Administration has pointed to the Clean Power Plan and the WOTUS rule as targets for regulatory change.

## 2. Secretary of Energy Rick Perry

Former Texas Governor Rick Perry was nominated for the position of Secretary of Energy on December 13, 2016<sup>21</sup> and was confirmed by the Senate on March 2, 2017 by a 62-37 vote.<sup>22</sup> Perry's nomination followed suit to Pruitt's nomination in the selection of a Cabinet official deeply skeptical of the agency they were to lead, given Perry's pledge as a former Presidential candidate to dismantle the Department of Energy.<sup>23</sup>

Perry was born and raised in Haskell, Texas, not far from the home of another Texas icon, James Decker. He graduated from Texas A&M in 1972 with a degree in Animal Science.<sup>24</sup> A member of the Corps of Cadets, Perry served in the U.S. Air Force, being discharged in 1977 at the rank of Captain.<sup>25</sup> He was elected to the Texas House of Representatives in 1984. Originally a Democrat, Perry switched parties in 1989, and was elected Texas Agriculture Commissioner in 1990.<sup>26</sup> He later successfully campaigned for the office of Lieutenant Governor in 1999.<sup>27</sup> Following his term as Lieutenant Governor, Perry succeeded George H. Bush as Governor when Bush resigned to serve as President. Later elected in his own right, Perry served as the longest-tenured governor in the history of Texas from 2000 until 2015.<sup>28</sup>

Perry's term as governor coincided with "the shale revolution" in Texas which saw significant expansion of horizontal drilling and hydraulic fracturing technology to access formations such as the Woodford Shale and Eagle Ford Shale plays. Supporters of his nomination

cited his experience as Governor during this period as a strong positive for his potential leadership as Secretary of Energy and his ability to foster growth in the energy industry.<sup>29</sup> Additionally, supporters noted his reputation throughout his political career for staunch fiscal conservatism; Perry has advocated for reduced government spending and a reduced role for the federal government.<sup>30</sup> Conversely, this led some to criticize his appointment as leader of the Department of Energy based on concerns over his ability or willingness to preserve funding for the Department's research and regulatory efforts.<sup>31</sup> Further, critics also noted that for all his experience with the oil and gas industry, Perry has little experience with nuclear energy and its regulation; administration of nuclear energy regulations, cleanup of defense-generated nuclear waste, and managing federal nuclear resources accounted for nearly 63% of the Department's FY16 budget.<sup>32</sup>

Perry's had previously called the science behind anthropogenic climate change "unsettled," but in his confirmation hearing he seemed to acknowledge the concept, stating "I believe the climate is changing. I believe some of it is naturally occurring, but some of it is also caused by man-made activity. The question is how do we address it in a thoughtful way that doesn't compromise economic growth, the affordability of energy or American jobs."<sup>33</sup>

As mentioned above, the majority of the Department of Energy's budget is devoted to nuclear energy matters, but the Department's mission also includes funding for research into all sources of energy, as well as support for federal and state initiatives through the Office of Energy Efficiency and Renewable Energy.

---

<sup>21</sup> Coral Davenport, "Rick Perry, Ex-Governor of Texas, is Trump's Pick as Energy Secretary." *NEW YORK TIMES*, December 13, 2016, <https://www.nytimes.com/2016/12/13/us/politics/rick-perry-energy-secretary-trump.html> (last accessed May 14, 2017).

<sup>22</sup> Steven Mufson, "Senate Votes to Confirm Former Texas Governor Rick Perry as Energy Secretary." March 2, 2017, [https://www.washingtonpost.com/news/energy-environment/wp/2017/03/02/senate-votes-to-confirm-former-texas-governor-rick-perry-as-energy-secretary/?utm\\_term=.655cd0bb9905](https://www.washingtonpost.com/news/energy-environment/wp/2017/03/02/senate-votes-to-confirm-former-texas-governor-rick-perry-as-energy-secretary/?utm_term=.655cd0bb9905) (last accessed May 14, 2017).

<sup>23</sup> *Id.*

<sup>24</sup> Chris Hooks, "Aggie Years Launched Perry – and a Rivalry." *THE TEXAS TRIBUNE*, August 2, 2011, <https://www.texastribune.org/2011/08/02/perry-aggie-years/> (last accessed May 14, 2017). i

<sup>25</sup> U.S. Global Leadership Coalition, "Rick Perry." Undated, <http://www.usglc.org/2011/08/12/rick-perry/> (last accessed May 14, 2017).

<sup>26</sup> Ballotpedia, "Rick Perry." Undated, [https://ballotpedia.org/Rick\\_Perry](https://ballotpedia.org/Rick_Perry) (last accessed May 14, 2017).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Mufson, *supra* note 22

<sup>30</sup> See Rick Perry, *FED UP! OUR FIGHT TO SAVE AMERICA FROM WASHINGTON* (2010).

<sup>31</sup> Mufson, *supra* note 22.

<sup>32</sup> U.S. Department of Energy Office of the Chief Financial Officer, FY2017 Budget Justification, *available at* <https://energy.gov/cfo/downloads/fy-2017-budget-justification> (last accessed May 15, 2017).

<sup>33</sup> Timothy Gardner and Valerie Volcovici, "Trump's Energy Pick Perry Softens Stance on Climate Change." *Reuters*, January 19, 2017, <http://www.reuters.com/article/us-usa-congress-perry-idUSKBN1531OZ> (last accessed May 15, 2017).



3. Secretary of Agriculture Sonny Perdue

Former Georgia Governor Sonny Perdue was announced as the nominee for Secretary of Agriculture on January 18, 2017<sup>34</sup> and was confirmed by the Senate in an 87 – 11 vote on April 24, 2017.<sup>35</sup> Perdue started in politics in 1990 as a Democratic state senator in Georgia but switched parties and in 2001 was elected the first Republican governor for the state since Reconstruction.<sup>36</sup>

The son of a farmer and a school teacher, Perdue graduated from the University of Georgia with his DVM in 1971.<sup>37</sup> While in his veterinary studies, Perdue also served in the U.S. Air Force, being discharged in 1974 at the rank of Captain.<sup>38</sup> Prior to his career in politics, Perdue started small businesses in agribusiness and transportation.<sup>39</sup>

Perdue's record on environmental issues is relatively sparse. Under his governorship, Georgia fought EPA requirements for reformulated gasoline on the grounds the EPA requirements were not a fit for the ozone issues in the Atlanta area.<sup>40</sup> In a 2014 editorial, Perdue made the following statement regarding the climate change debate:

It reminds me of the national debate over climate change. Conservatives throw up their hands when some on the left or in the mainstream media explain every deviation in weather as a consequence of climate change. Climate change, we're told, is responsible for heavy rains and drought alike. Whether temperatures are unseasonably low or high, global warming is the culprit. Snowstorms,

hurricanes, and tornadoes have been around since the beginning of time, but now they want us to accept that all of it is the result of climate change. It's become a running joke among the public, and liberals have lost all credibility when it comes to climate science because their arguments have become so ridiculous and so obviously disconnected from reality.<sup>41</sup>

As a federal administrative agency, the U.S. Department of Agriculture (USDA) does not have significant environmental enforcement authority; rather, USDA has a number of programs incentivizing environmental "best practices" including coordination with EPA through the USDA Natural Resources Conservation Service (NRCS) to fund Non-Point Source Pollution prevention projects under the Clean Water Act's Section 319<sup>42</sup> and Farm Bill-funded programs such as the Conservation Stewardship Program (CSP), Environmental Quality Incentives Program (EQIP) (including its subsidiary Air Quality Initiative), and the Wildlife Habitat Incentive Program (WHIP).<sup>43</sup> Additionally, USDA frequently coordinates with EPA to provide research on agriculturally-specific environmental issues such as atmospheric emissions from livestock facilities (discussed in more detail below).

4. Secretary of the Interior Ryan Zinke

Representative Ryan Zinke was announced as President's Trump's nominee for Secretary of the Interior on December 15, 2016<sup>44</sup> and was confirmed by the Senate on a 68-31 vote on March 1, 2017.<sup>45</sup> He grew

<sup>34</sup> Politico, "Trump to Announce Sonny Perdue for Agriculture." January 18, 2017, <http://www.politico.com/story/2017/01/trump-will-pick-sonny-perdue-to-lead-agriculture-233820>.

<sup>35</sup> United States Senate, Roll Call Vote 115<sup>th</sup> Congress, 1<sup>st</sup> Session, [https://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=115&session=1&vote=00112](https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=115&session=1&vote=00112). April 24<sup>th</sup>, 2017 (last accessed May 14, 2017).

<sup>36</sup> NBC News, "Donald Trump Taps Former Georgia Gov. Sonny Perdue as Secretary of Agriculture." January 18, 2017, <http://www.nbcnews.com/politics/politics-news/donald-trump-taps-georgia-gov-sonny-perdue-secretary-agriculture-n708651> (last accessed May 14, 2017).

<sup>37</sup> National Governors Association, "Sonny Perdue." Undated, [https://www.nga.org/cms/home/governors/past-governors-bios/page\\_georgia/col2-content/main-content-list/title\\_perdue\\_sonny.default.html](https://www.nga.org/cms/home/governors/past-governors-bios/page_georgia/col2-content/main-content-list/title_perdue_sonny.default.html) (last accessed May 14, 2017).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Office of Governor Sonny Perdue, "Statement of Governor Sonny Perdue Regarding Court Ruling to Stay Transition to Reformulated Gasoline." October 20, 2004,

[http://sonnyperdue.georgia.gov/00/press/detail/0%2c2668%2c78006749\\_92321069\\_92829588%2c00.html](http://sonnyperdue.georgia.gov/00/press/detail/0%2c2668%2c78006749_92321069_92829588%2c00.html) (last accessed May 14, 2017).

<sup>41</sup> Sonny Perdue, "The Common Core Blame Game." NATIONAL REVIEW, May 8, 2014, <http://www.nationalreview.com/article/377495/common-core-blame-game-sonny-perdue> (last accessed May 14, 2017).

<sup>42</sup> 33 U.S.C. § 1329.

<sup>43</sup> USDA, "2014 Farm Bill – Financial Assistance Programs – NRCS." Undated, [https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/pr\\_ograms/farmbill/?cid=stelprdb1237774](https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/pr_ograms/farmbill/?cid=stelprdb1237774) (last accessed May 14, 2017).

<sup>44</sup> GreatAgain.gov press release, "President-Elect Donald J. Trump Intendes to Nominate U.S. Congressman Ryan Zinke as Secretary of the Interior." December 15, 2016, [https://greatagain.gov/president-elect-trump-to-nominate-ryan-zinke-as-secretary-of-the-interior-617f97059c0f#\\_2ujqvk31h](https://greatagain.gov/president-elect-trump-to-nominate-ryan-zinke-as-secretary-of-the-interior-617f97059c0f#_2ujqvk31h) (last accessed May 13, 2017).

<sup>45</sup> CNN, "Senate Approves Trump's Nominee for Interior." March 1, 2017, <http://www.cnn.com/2017/03/01/politics/ryan-zinke->

up in Montana near Glacier National Park, and graduate from the University of Oregon with a degree in geology. Zinke served for 23 years as a U.S. Navy SEAL and is the first SEAL to serve in Congress as well as the first to hold a Cabinet position.<sup>46</sup>

Zinke was a Republican Congressman from Wyoming and had a reputation for “the Teddy Roosevelt Philosophy of managing public lands, which calls for multiple use [sic] to include economic, recreation and conservation [sic].”<sup>47</sup> In his confirmation hearings, Zinke spoke out against the sale or transfer of federal lands, but would “prioritize maintenance funds for national parks and federal lands.”<sup>48</sup> In his testimony before the Senate Energy and Natural Resources Committee, Secretary Zinke stated with respect to climate change, “Man has had an influence [on climate]... I think that's indisputable as well” and affirmed that he would base his actions on “objective science.”<sup>49</sup> He also stated he would review the Obama administration’s limitations on oil and gas drilling on publicly-held lands, and was uncertain whether it would be possible to rescind the Obama Administration’s designation of millions of acres of land as “national monuments.”<sup>50</sup>

The Department of the Interior (DOI) manages 500 million acres of land (approximately one-fifth of the total land area of the United States), with over half of that amount administered through the Bureau of Land Management.<sup>51</sup> While it does not enact primary environmental regulations, as such a significant “landowner” it can, however, exert significant influence on environmental policy through the requirements it imposes on users of its lands, such as the Obama Administration’s significant restrictions on hydraulic fracturing on DOI lands that was eventually struck down in federal court.<sup>52</sup>

---

[confirmation-vote-interior-secretary/](#) (last accessed May 13, 2017).

<sup>46</sup> GreatAgain.gov, *supra* note 44.

<sup>47</sup> GreatAgain.gov, *supra* note 44.

<sup>48</sup> CNN, *supra* note 45.

<sup>49</sup> CNN, “Interior Nominee will Review Obama Limits on Oil and Gas Drilling,” <http://www.cnn.com/2017/01/17/politics/ryan-zinke-interior-secretary-confirmation-hearing/> (last accessed May 13, 2017).

<sup>50</sup> CNN, *supra* note 49.

<sup>51</sup> U.S. Department of the Interior, INTRODUCTION TO INTERIOR ACQUISITIONS: A GUIDE FOR SMALL BUSINESSES. Undated, available at <https://www.doi.gov/sites/doi.gov/files/migrated/pmb/osdbu/upload/dbwdoi.pdf>.

<sup>52</sup> Coral Davenport, “Obama Fracking Rule is Struck Down by Court.” THE NEW YORK TIMES, June 22, 2016, available at

<https://www.nytimes.com/2016/06/23/us/politics/hydraulic->

### **C. The Supreme Court and Justice Gorsuch**

While not an administrative appointment to the executive branch, a discussion of the environmental impact of the Trump Administration would be incomplete without analysis of former Tenth Circuit justice Neil Gorsuch to the U.S. Supreme Court. Justice Gorsuch was born in Denver and graduated from Columbia University with a degree in political science in 1988.<sup>53</sup> He was a Marshall Scholar with his study program conducted at Oxford University (obtaining a D.Phil. in Philosophy) and graduated from Harvard Law School in 1991 where he attended under the Harry S. Truman Scholarship (and had one Barak Obama as a classmate).<sup>54</sup> Gorsuch clerked for Supreme Court Justice Byron White and spent ten years in private practice before becoming a Deputy Associate Attorney General at the U.S. Department of Justice<sup>55</sup> where he served from 2005 to 2006 before his nomination and unanimous confirmation as a Justice of the Tenth Circuit Court of Appeals in 2006.<sup>56</sup> Justice Gorsuch was nominated by President Trump to fill the vacancy created by the passing of Justice Antonin Scalia in February of 2016. Legal observers noted that he is perhaps the most natural successor to Scalia given his textualist approach and views on statutory interpretation.<sup>57</sup>

The coming years almost certainly will bring a number of important environmental cases before the Supreme Court, and Justice Gorsuch’s legal perspectives will be important in the resolution of those cases before a court that has historically been closely balanced with respect to such issues. Two of Justice Gorsuch’s perspectives will likely come to bear on those issues. First, Justice Gorsuch – much like Justice Scalia – has been a critic of the “dormant” or “negative” Commerce Clause of the Constitution. The Commerce

---

[fracturing-interior-department-regulations.html](#) (last accessed May 15, 2017).

<sup>53</sup> Sara Clarke, “10 Things You Didn’t Know about Neil Gorsuch.” U.S. NEWS AND WORLD REPORT, January 31, 2017, <https://www.usnews.com/news/national-news/articles/2017-01-31/10-things-you-didnt-know-about-neil-gorsuch> (last accessed May 15, 2017).

<sup>54</sup> Eric Citron, “Potential Nominee Profile: Neil Gorsuch.” SCOTUSBLOG, January 13, 2017, <http://www.scotusblog.com/2017/01/potential-nominee-profile-neil-gorsuch/> (last accessed May 15, 2017).

<sup>55</sup> Harvard Law Today, “Neil M Gorsuch ’91 Nominated to the U.S. Supreme Court.” January 31, 2017, <https://today.law.harvard.edu/president-trump-nominates-neil-m-gorsuch-91-u-s-supreme-court/> (last accessed May 15, 2017).

<sup>56</sup> Presidential Nomination 1565, 109<sup>th</sup> Congress (July 20, 2006).

<sup>57</sup> Citron, *supra* note 54.



Clause states the U.S. Congress shall have the power “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”<sup>58</sup> Through the course of judicial interpretation, the dormant/negative Commerce Clause was constructed as an implication of the Commerce Clause that states should not be able to make laws that “unfairly” burden or discriminate against interstate commerce. However, as Justice Scalia noted, “The fundamental problem with our negative Commerce Clause cases is that the Constitution does not contain a negative Commerce Clause.”<sup>59</sup> A justice’s perspective on the Commerce Clause (and its dormant/negative corollary) can affect their view on environmental issues for two primary reasons. First, the entire authority of EPA and every major environmental law – including the Clean Water Act, the Clean Air Act, the Resource Conservation and Recovery Act, and the Comprehensive Environmental Response, Compensation, and Liability Act – rests on the authority of the Commerce Clause. Further, many elements of these laws use the Commerce Clause to define the limits of their jurisdiction, such as the hotly-contested definition of “waters of the United States” as applied in the Clean Water Act.<sup>60</sup> While a Justice’s perspective on the Commerce Clause matters greatly to interpretation of federal environmental laws, so too does the interpretation of the dormant/negative Commerce Clause. As mentioned above, states increasingly seek their own environmental standards, such as California’s more-stringent air emissions standards. If such disparate standards are shown to affect interstate commerce, a Justice’s view on state’s rights to enact such standards could be vital to resolution of a case.

The second important perspective is a Justice’s view on “*Chevron* deference.” In briefest summary, the Supreme Court crafted a doctrine in its opinion of *Chevron U.S.A. Inc. v. NRDC* 467 U.S. 837 (1984) that, if Congress gives an administrative agency broad authority to enact administrative rules in an area, the courts should permit the agency to have similarly broad authority to enact such rules and courts should defer to the technical expertise of the agency. Justice Gorsuch’s Tenth Circuit opinions show significant skepticism with respect to *Chevron* deference:

...[a]nd an agency’s recourse for a judicial declaration of the law’s meaning that it dislikes would be precisely the recourse the

Constitution prescribes — an appeal to higher judicial authority or a new law enacted consistent with bicameralism and presentment. We managed to live with the administrative state before *Chevron*. We could do it again. Put simply, to me that in a world without *Chevron* very little would change — except perhaps the most important things.<sup>61</sup>

Justice Gorsuch’s perspective on *Chevron* deference holds important implications for a number of potential challenges to environmental regulations. In particular, the pending review of the WOTUS rule hinges both on the interpretation of the Commerce Clause and how much deference should be given to administrative interpretations of jurisdictional authority.

Before moving to other discussions, it should be noted Justice Gorsuch has one more interesting and inherited environmental credential: his mother Ann Gorsuch Burford was appointed by President Reagan as the first woman to serve as Administrator of the Environmental Protection Agency.<sup>62</sup>

## II. WATER

Beyond the general administrative and judicial actions with environmental impacts, the Trump Administration has taken a number of actions impacting the three primary environmental media (water, air, and land). A primary focus of controversy for water issues has been the WOTUS rule, with major changes already seen on that front since the inauguration.

### A. Background for the Waters of the United States (WOTUS) Rule

The Federal Water Pollution Control Act<sup>63</sup> (“FWPCA,” most frequently referred to as the “Clean Water Act” or “CWA”) seeks to protect water quality by managing pollution sources. Specifically, the CWA states “except as in compliance with this section... the discharge of any pollutant by any person shall be unlawful.”<sup>64</sup> Thus, to understand how the CWA works, one must unpack a few layers of definitions.

“Discharge” means “any addition of any pollutant to navigable waters from any point source” (emphasis added).<sup>65</sup>

“Pollutant” is defined as dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge,

<sup>58</sup> U.S. Constitution, Article I, Section 8.

<sup>59</sup> *Comptroller of the Treasury of Maryland v. Wynne*, 135 S. Ct. 1787 (2015)(Scalia, J. dissenting).

<sup>60</sup> See, .e.g. *Rapanos, et al., v. U.S. Army Corps of Engineers, et al.*, 126 S.Ct. 2208 (2006).

<sup>61</sup> *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016) (Gorsuch, concurring). It should be noted that Justice

Gorsuch wrote the majority opinion in this case, but also wrote a separate concurring opinion specifically to address the *Chevron* issue.

<sup>62</sup> Clarke, *supra* note 53.

<sup>63</sup> 33 U.S.C. §§ 1251 *et seq.*

<sup>64</sup> 33 U.S.C. § 1311(A) (emphasis added).

<sup>65</sup> 33 U.S.C. § 1362(12).

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. This term does not mean (A) "sewage from vessels" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well is used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.<sup>66</sup>

This definition was intended to be quite broad. Virtually any material discharged to a navigable water can be considered a pollutant under this definition.

"Navigable water" is the next critical definition in the chain, and is widely regarded as the weakest link. Unfortunately, the only definition provided for the term in the CWA is that "'navigable waters' means the waters of the United States, including the territorial seas."<sup>67</sup> Unsurprisingly, this broad definition posed a number of challenges for both EPA and the regulated community. In an attempt to resolve the issue, EPA and the U.S. Army Corps of Engineers (USACE) established a regulatory definition of the term:

Waters of the United States means:

- (a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (b) All interstate waters, including interstate "wetlands;"
- (c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:(1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;(2) From which fish or shellfish are or could be taken and sold in

interstate or foreign commerce; or(3) Which are used or could be used for industrial purposes by industries in interstate commerce;

- (d) All impoundments of waters otherwise defined as waters of the United States under this definition;
- (e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;
- (f) The territorial sea; and
- (g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.<sup>68</sup>

### **B. Efforts to clarify a definition of "waters of the United States"**

Even this definition posed many interpretation challenges for EPA, state agencies, and the regulated community. This led to a number of United States Supreme Court cases trying to clear the waters, so to speak. In *U.S. v. Riverside Bayview Homes*,<sup>69</sup> the Court held Congress meant "navigable" to be broader than the traditional definition, and found that wetlands – definitely not navigable in the normal sense – were regulated by the CWA. In *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*,<sup>70</sup> the Court held a water body must have some connection with traditionally navigable waters to be within the CWA. The Court hoped to resolve the controversy by its 2006 decision in *Rapanos v. U.S. Army Corps of Engineers*,<sup>71</sup> which dealt with a wetland (as in *Riverside*) and its connection to navigable waters (as in *SWANCC*). Unfortunately, five separate opinions were written in the case, with none of them gathering a majority of the justices. Justice Scalia wrote the plurality opinion, in which he concluded the definition of "waters of the United States" should encompass only relatively permanent, standing, or continuously flowing bodies of water. Conversely, Justice Kennedy wrote a concurring opinion stating the rule for determining when a water body was a "navigable water" should be whether the water body bears a "significant [hydrological] nexus" to a water body that was navigable in fact.

In light of *Rapanos*, agencies continued to struggle with the WOTUS definition. Hoping to provide clarity and certainty to potentially-regulated parties, EPA and the Corps of Engineers proposed the WOTUS rule. The rule focused on Justice Kennedy's opinion in *Rapanos*,

<sup>66</sup> 33 U.S.C. § 1362 (6). Note that "agricultural waste" is specifically included in this definition.

<sup>67</sup> 33 U.S.C. § 1362(7).

<sup>68</sup> 40 C.F.R. §122.2.

<sup>69</sup> 474 U.S. 121 (1985).

<sup>70</sup> 121 S. Ct. 675.

<sup>71</sup> 126 S. Ct. 2208 (2006)

stating a water body should have a “significant nexus” to traditionally navigable waters for CWA jurisdiction. In the 88 page rule document, EPA and the Corps explained a number of factors the rule would examine to determine whether a significant nexus existed. Some groups argued the rule provided clarity and properly fulfilled the intent of the CWA; others argued the significant nexus test was vague and could be used to extend federal regulatory authority to almost any water. Further, in a move attracting significant criticism, EPA and USACE focused almost exclusively on Justice Kennedy’s significant nexus test, despite the fact that it was a concurring opinion and not the prevailing plurality opinion (although the agencies justified this decision on the basis that Justice Kennedy’s opinion came closest to harmonizing the disparate opinions issued in *Rapanos*).

### **C. Trump Administration efforts on WOTUS and pending developments**

As mentioned above, 31 states filed suits protesting the proposed rule, with those cases being consolidated in to a case before the Sixth Circuit, which suspended the rule pending review.<sup>72</sup> Fulfilling a campaign promise, President Trump signed Executive Order 13778 on February 28<sup>th</sup>, 2017, requiring EPA and USACE to review the WOTUS rule and to either revise the existing rule or withdraw it and propose an new rule with the final resulting rule “to consider interpreting the term ‘navigable waters,’ as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*.”<sup>73</sup> Paralleling this action, the Trump Administration also filed a motion in the Supreme Court to halt its consideration of a jurisdictional petition in *National Association of Manufacturers v. Department of Defense*<sup>74</sup> (contesting the jurisdiction of the Sixth Circuit to hear the consolidated WOTUS cases) while EPA and USACE carried out the reconsideration under the executive order, but the Supreme Court declined to grant the motion.

Resolution of the WOTUS controversy both in the agencies, Sixth Circuit, and Supreme Court has implications for a number of pending cases, including *Duarte Nursery v. U.S. Army Corps of Engineers*.<sup>75</sup> In *Duarte*, the issue was whether field cultivation near “vernal pools” (depressed areas that fill with water during wetter periods of the year, but may be dry for the remainder) constituted a violation of Section 404 of the federal Clean Water Act (CWA). The Corps alleged Duarte had been cultivating the soils near the pools,

resulting in the “discharge” of soils into them. The district court applied the “significant nexus” test proposed by the U.S. Supreme Court’s *Rapanos* case and determined that even though there was no surface connection between the pools and the closest stream (Coyote Creek, a tributary of the Sacramento River) the pools were “hydrologically connected” to the Sacramento River. The court made this determination even though there was no surface connection between the pools and another water body that could be considered “navigable” (another CWA term). Although limited to California and currently under appeal, many observers have noted this case as an example of the expansive interpretations possible under the previous version of the WOTUS rule and have cautioned that, if eventually effective, the current WOTUS rule would expand EPA and Corps jurisdiction even further.

Conversely, a number of observers hailed the case of *United States Army Corps of Engineers v. Hawkes*<sup>76</sup> as a step forward for landowners. In the *Hawkes* case, the Corp had issued a “jurisdictional determination” finding that portions of Hawke’s land constitute a WOTUS. Such determinations often put landowners in form of Purgatory since they not be appealed to a court, but could also be erroneous upon further examination. Thus, landowners faced three difficult options: (1) consider the land “off limits” for any activity that did not have a CWA permit, (2) ignore the determination and proceed with use of the land, with the potential of civil or criminal liability if any future activity was found in violation of the CWA, or (3) spend significant sums of time and money to secure an EPA or Corps permit that might not be necessary. In *Hawkes*, the U.S. Supreme Court determined this put landowners in an unacceptable box, and ruled that landowners could immediately appeal a jurisdictional determination to a court. This means landowners have an important tool to more quickly resolve at least some WOTUS conflicts for their property.

The once certainty seems to be that there remains some work to be done before the regulated community sees certainty in the resolution of the WOTUS controversy. Although those calling for the rule’s repeal and a return to a WOTUS definition more consistent with permanent waters that are “navigable” in the literal sense have hope in the actions of the Trump Administration to move to a definition consistent with the Scalia opinion, any final administrative rule retreating from the scope of the WOTUS proposal of the Obama Administration is almost certain to be challenged in litigation. In such a case, those looking

<sup>72</sup> U.S. Court of Appeals for the Sixth Circuit cases 15-3799, 3822, 3853, 3887, order filed October 9, 2015.

<sup>73</sup> Executive Order 13778 (February 28, 2017).

<sup>74</sup> U.S. Supreme Court Docket No. 16-299.

<sup>75</sup> Civ S-13-2095, U.S. District Court for Eastern District of California.

<sup>76</sup> Slip. Op., Docket No. 15-290, May 31, 2016.

for a more restrained scope of the WOTUS definition to have further hope in the fact that Justice Gorsuch replaced Justice Scalia and would likely take a similar approach to the term's interpretation.

### III. AIR

The Trump Administration's principal actions in the air pollution realm have focused on rolling back the Obama Administration's actions regarding climate change through the Clean Power Plan, although on the litigation front, the effects of reporting requirements under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Emergency Planning and Community Right to Know Act (EPCRA) may hold important implications for agriculture and expose limits to what the Trump Administration can do limit environmental regulation without Congressional Action.

#### A. Executive Order 13783 and the "end of the war on coal"

On March 28, 2017, President Trump issued Executive Order 13783, entitled "Promoting Energy Independence and Economic Growth." The order stated

It is further in the national interest to ensure that the Nation's electricity is affordable, reliable, safe, secure, and clean, and that it can be produced from coal, natural gas, nuclear material, flowing water, and other domestic sources, including renewable sources. Accordingly, it is the policy of the United States that executive departments and agencies (agencies) immediately review existing regulations that potentially burden the development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law.<sup>77</sup>

The order went further to explicitly revoke the following Executive Obama Administration executive orders and reports:

- 1) Executive Order 13653 of November 1, 2013 (Preparing the United States for the Impacts of Climate Change);
- 2) The Presidential Memorandum of June 25, 2013 (Power Sector Carbon Pollution Standards);
- 3) The Presidential Memorandum of November 3, 2015 (Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment);
- 4) The Presidential Memorandum of September 21, 2016 (Climate Change and National Security).
- 5) The Report of the Executive Office of the President of June 2013 (The President's Climate Action Plan);
- 6) The Report of the Executive Office of the President of March 2014 (Climate Action Plan Strategy to Reduce Methane Emissions).

Finally the order rescinded The Council on Environmental Quality guidance entitled "Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews,"

While the executive order is fairly sweeping in its scope, its final impact is difficult to determine. On the one hand, there was a reason the Obama Administration made administrative rulemaking its primary weapon in addressing climate change issues: Congress has repeatedly demonstrated an ability to come to any sort of consensus on the issue or enact any legislation to deal with greenhouse gas (GHG) regulation.<sup>78</sup> Thus, President Obama declared "I've got a pen and I've got a phone"<sup>79</sup> and used the full extent of his executive authority to address climate change concerns.

While many have accused the Obama Administration of regulatory overreach in responding to climate change concerns, one must remember that *Massachusetts v. EPA* found that GHGs fit squarely within the definition of "air pollutant" under the Clean Air Act (CAA) and thus EPA was required to address them under the requirements of the CAA until and unless Congress enacted legislation specifically addressing GHGs separately.<sup>80</sup> As a result, the actions by the Trump Administration to restrict EPA's actions

<sup>77</sup> Executive Order 13783 (March 28, 2017).

<sup>78</sup> Amber Phillips, "Congress's Long History of Doing Nothing on Climate Change, in 6 Acts." THE WASHINGTON POST, December 1, 2015, [https://www.washingtonpost.com/news/the-fix/wp/2015/12/01/congresss-long-history-of-inaction-on-climate-change-in-6-parts/?utm\\_term=.96275b329df0](https://www.washingtonpost.com/news/the-fix/wp/2015/12/01/congresss-long-history-of-inaction-on-climate-change-in-6-parts/?utm_term=.96275b329df0) (last accessed May 15, 2017).

<sup>79</sup> CBS DC, "Obama on Executive Actions: 'I've Got a Pen and I've Got a Phone.'" January 14, 2014, <http://washington.cbslocal.com/2014/01/14/obama-on-executive-actions-ive-got-a-pen-and-ive-got-a-phone/> (last accessed May 15, 2017).

<sup>80</sup> *Massachusetts v. EPA*, 127 S. Ct. 1438 (2006).

on climate change are almost certain to be countered by environmental groups bringing suit to enforce the requirements of the CAA in light of the *Massachusetts* decision.

Additionally, although the current Administration's actions have explicitly appealed to coal-dependent states (see discussion above regarding Democratic senators from North Dakota and West Virginia crossing party lines to vote for confirmation of Scott Pruitt as EPA Administrator), forces beyond government intervention may dictate a continued decline in coal utilization. For the past several years, a number of factors have continued to drive up the levelized cost of coal-powered electrical generation, while those costs for other generation technologies including natural gas, wind, and solar have continued to trend downward. Further, the "shale revolution" has made natural gas an even more desirable electrical generation fuel, made even more appealing by the fact that it can provide a rapidly-dispatchable power source to be coupled with wind and solar installations (increasingly demanded by large-scale power consumers such as Google data centers). Despite the Trump Administration's best efforts, it may simply be too late to reverse the fortunes of the coal industry.<sup>81</sup>

## **B. CERCLA and EPCRA reporting**

Under CERCLA, releases of hazardous substances can trigger a requirement to report such emissions to local emergency management services and to the EPA National Response Center.<sup>82</sup> The list of materials for which CERCLA reporting is required includes ammonia and hydrogen sulfide,<sup>83</sup> two materials that can be released to the atmosphere from animal waste storage areas. At the same time, it is difficult to precisely determine the emissions from an open area such as an animal waste lagoon, and thus it was difficult to know if reportable quantities of ammonia, hydrogen sulfide, or any other reportable materials were occurring.

In January of 2005, EPA issued a consent order granting livestock operations immunity from any potential violations of the emissions reporting requirements in exchange for data from the operations that would aid in a National Air Emissions Monitoring Study to evaluate animal feeding operations emissions. In 2008, EPA issues a rule exempting farm from CERCLA emissions reporting, but a case was filed to review the farm exemption.<sup>84</sup>

Waterkeepers Alliance and other environmental and animal welfare groups challenged the exemption in

federal court in the case *Waterkeeper Alliance et al. v. EPA*.<sup>85</sup> On review of the EPA rule, the D.C. Circuit court considered whether the exemption was a reasonable interpretation of the CERCLA and EPCRA requirements, or if Congress had directly spoken on the issue and the rule contradicted that interpretation thus invoking analysis under the *Chevron* deference doctrine. The court disagreed with EPA's arguments that both statutes gave EPA the authority to create exemptions, viewing the statutes as straightforward with a list of exemptions, and upheld reporting requirements for all non-exempt releases. The court noted nothing in the statutes gave EPA the authority to create exemptions other than those spelled out in CERCLA and EPCRA.

It is worth noting here that courts have allowed agencies to utilize the *de minimis* doctrine, which allows agencies to avoid an absurd result due to statutory language. However, agencies cannot use the *de minimis* doctrine based on a concern that the benefits of its application exceed the costs. EPA tried to justify the exemption under this doctrine by arguing that in most cases, federal responses would be unlikely. Nevertheless, based on EPA's own regulatory language, there could be situations where responses would be necessary, as the court observed, noting commenters on the final rule cited situations when EPA would need to take action.

Additionally, several public comments on the rule pointed out how local officials use these reports to respond to public complaints. For example, if a citizen calls in the middle of the night complaining of a foul odor or chemical smell, a responder can look at the release reports to determine the facility involved. Reported releases save responders from driving around aimlessly looking for the cause of the complaint. To the court, all these comments served to undermine the 2008 final rule and EPA's justification for that rule. To the court, there is a benefit to requiring reporting justifying the estimated costs. The three-judge panel agreed with the plaintiff, Waterkeepers, and vacated the final rule exempting CAFOs. It is now up to EPA to promulgate new rules consistent with the decision, and the promulgation process will be interesting given the aforementioned Trump Administration executive orders on rule promulgation. The *Waterkeeper* decision will pit administrative will directly against legislative mandate in one of the first real tests for the Pruitt EPA.

<sup>81</sup> See Valerie Volcovici, Nchola Groom and Scott DiSavino, "Trump Declares End to 'War on Coal,' but Utilities aren't Listening." Reuters, April 5, 2017, <http://www.reuters.com/article/us-usa-trump-climate-power-idUSKBN1770D8> (last accessed May 15, 2017).

<sup>82</sup> See 40 C.F.R. part 302.

<sup>83</sup> 40 C.F.R. part 355, appendix A.

<sup>84</sup> *Waterkeeper Alliance v. EPA*, Case D.C. 09-1017.

<sup>85</sup> U.S. Court of Appeals for the D.C. Circuit, Case No. 09-1017 (April 11, 2017).

#### **IV. LAND**

While one might argue there is little new under the sun with respect to regulation of the land medium under the Resource Conservation and Recovery Act (RCRA), CERCLA, or EPCRA, there is at least an important development with respect to developments on, or more precisely under, the land. Within days of his inauguration, President Trump issued a presidential memorandum explicitly invited the TransCanada Keystone Pipeline to resubmit its application for the construction and operation of the Keystone XL Pipeline, simultaneously directing the Department of State to review the application within 60 days of the resubmission.<sup>86</sup> Of particular note, the memorandum addressed a significant sticking point of previous permitting efforts for the pipeline – its environmental impact, to wit:

To the maximum extent permitted by law, the Final Supplemental Environmental Impact Statement issued by the Department of State in January 2014 regarding the Keystone XL Pipeline (Final Supplemental EIS) and the environmental analysis, consultation, and review described in that document (including appendices) shall be considered by the Secretary of State to satisfy the following with respect to the Keystone XL Pipeline as described in TransCanada's permit application to the Department of State of May 4, 2012:

- (A) all applicable requirements of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 et seq.; and
- (B) any other provision of law that requires executive department consultation or review (including the consultation or review required under section 7(a) of the Endangered Species Act of 1973, 16 U.S.C. 1536(a))

It remains to be seen how far the executive fiat can carry a review under the National Environmental Policy Act (NEPA), but the order demonstrates a lowering of virtually every administratively-erected barrier to the project.

On the same date as the Presidential memorandum, Trump signed the second executive order of his Presidency, entitled “Expediting Environmental Reviews and Approvals for High Priority Infrastructure

Projects.”<sup>87</sup> Shortly thereafter, the Deputy Secretary of the Army indicated it would grant the final permit to allow the Dakota Access Pipeline (DAPL) to cross under Lake Oahe, effectively clearing the way for the project that had drawn massive protests at the Standing Rock Sioux Reservation.<sup>88</sup>

Both the Keystone and Dakota Access projects link strongly to President Trump’s campaign emphasis on infrastructure improvements, job creation, and a reduction in regulatory barriers. The coming months will see whether these executive orders truly clear the path for the completion of the projects or if additional collateral attacks await the executive actions.

#### **V. CONCLUSIONS**

President Trump and the Republican-majority House and Senate have moved quickly in their new terms to carry out a number of their campaign promises. In a manner both equal and opposite to his predecessor, President Trump has used the full reach of his executive powers to effectuate direct changes to policies and regulations he perceives to be barriers to the economic growth of the United States. His presidential appointments show a strong inclination to roll back past regulatory expansion and to look at new environmental regulations through a lens of economic impact.

Speaking of equal and opposite impacts, one must acknowledge the almost Newtonian nature of politics. Just as industry groups frequently used litigation to combat what they viewed as regulatory overreach, it is quite likely environmental groups will use the same tactics to fight any perceived reduction in environmental protection under the new leadership of federal agencies. To the extent such challenges reach the Supreme Court, the appointment of Justice Gorsuch and his textual interpretive approach may mean a turn to more strict, less-expansive interpretations of environmental statutes. This, in turn, leads back to the fact that Congress is the source for the environmental laws that create the framework under which administrative agencies do their work. The coming months and years may also serve to emphasize that administrative action can only accomplish so much before it runs into the boundaries created by legislative action. The mid-term elections will be an important barometer of the public’s perception of the Administration’s approach and the desire for Congress to do something about the fundamental environmental laws themselves.

Finally, for those who are concerned about the potential changes on the horizon, they may find some,

<sup>86</sup> Presidential Memorandum for the Secretary of State, the Secretary of the Army, and the Secretary of the Interior regarding Construction of the Keystone XL Pipeline, January 24, 2017.

<sup>87</sup> Executive Order 13766, January 24, 2017.

<sup>88</sup> Juliet Eilperin and Brady Dennis, “Trump Administration to Approve Final Permit for Dakota Access Pipeline,” THE WASHINGTON POST, February 7, 2017 (last accessed May 15, 2017).

albeit small, comfort in another Newtonian principle: inertia – objects in motion tend to stay in motion, and objects at rest tend to stay at rest. No matter how much an administration may push or pull, it is hard to change the course of a ship as large as the federal government. Or, to put it another way: the bureaucratic mentality is the only constant in the universe.<sup>89</sup>

---

<sup>89</sup> STAR TREK: THE UNDISCOVERED COUNTRY (Paramount Pictures, 1991).

