



# Practitioner's Environmental Law Review

Focusing on Defense Strategies

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## Regulation Under RCRA: *Cow Palace*

## C.A.R.E. v. Cow Palace LLC

- Concerned one of largest dairies in Washington
  - 11,000 cows
- Dairy estimated to produce over 100 million gallons of manure annually that must be managed
- Manure seepage into groundwater
- Nitrates

## C.A.R.E. v. Cow Palace LLC

- Court ruled manure that leaks from lagoons or is over-applied to fields is considered “discarded” as a solid waste
- Manure pollution poses an “imminent and substantial endangerment” to the environment and to people who drink the water
- Dairy is liable for “open dumping”
- RCRA does not apply to agricultural wastes that are “returned to the soil as fertilizers or soil conditioners”

## Cow Palace Consent Decree

- EPA will oversee implementation of Consent Decree terms
- Dairy will double line lagoons
- Dairy will pay to install 14 new groundwater monitoring wells
- Dairy shall maintain a centrifuge manure separator
- Dairy shall inspect underground conveyance systems
- Install concrete aprons along all water troughs within all cow pens at the Dairy
- Silage area will be located entirely on an impervious surface
- Implement Aerated Pile Pilot Project

## Cow Palace Consent Decree

- Land Application on fields owned, leased, or under control of Dairy will adhere to nutrient management budget
  - Soil Tests
  - Nutrient limitations on land application
- Dairy to provide clean drinking water to eligible residences through bottled water or reverse osmosis system
  - Eligible residences showing nitrate level of 10ppm or higher in their drinking water in prior 5 years and no reverse osmosis system or residences with reverse osmosis system but showing nitrate level of 60 ppm or higher
- Payment of attorney's fees, expert fees, and costs



## EPCRA and CERCLA: *Waterkeeper Alliance*

### CERCLA and EPCRA

- EPA has enforced against AFOs on two occasions
  - Large pork producers primarily concerning violations of CWA and CAA, CERCLA and EPCRA
  - Supplemental Environmental Project (SEP)
- Citizen suit provisions
  - Oklahoma v. Tyson
- Reporting Exemption
  - Exempts hazardous substance releases that are emitted to the air from animal waste at farms from CERCLA notification requirement
  - Until...

## *Waterkeeper Alliance v. EPA* (D.C. Cir. 2017)

- Addressed exemption for reporting air releases from animal waste under CERCLA and EPCRA
- 2008 Final Rule exempting animal waste air releases from reporting requirements
- Industry cited EPA's *de minimis* exception
  - Implied *de minimis* authority to create certain categorical exceptions to a statute when the burdens of regulation yield a gain of trivial or no value
- Question Presented: whether the record adequately supports the EPA's conclusion that these animal waste reports are truly unnecessary?
- Held: No. Final rule vacated.

## *Waterkeeper Alliance v. EPA* (D.C. Cir. 2017)

- Focus is on ammonia and hydrogen sulfide
- Both categorized as hazardous substances (CERCLA) and extremely hazardous substances (EPCRA)
  - Reportable quantity is 100 pounds per day
- Issue of **how to measure** these releases for animal waste
- Final Rule required CAFOs to report under EPCRA but not CERCLA and other farms exempt from both statutes
- Waterkeeper groups argue that CERCLA and EPCRA don't allow EPA to grant reporting exemptions but require reports of any and all releases above a reportable quantity
- Industry groups argue against CAFO carve out because based on public's desire for information, which is irrelevant to statutory purpose

## *Waterkeeper Alliance v. EPA* (D.C. Cir. 2017)

- Court applies *Chevron v. NRDC, Inc.* standards of “reasonable agency interpretation”
- Congress placed specific exemptions in statute
- Congress created these exemptions paired with a “sweeping reporting mandate”
  - Statutes require notification of “any release” of hazardous substance in amounts equal to or greater than reportable quantities
  - No language of delegation to EPA
- “We have no doubt that a desire for efficiency motivated some of the exceptions Congress provided, but those concerns don’t give the agency carte blanche to ignore the statute whenever it decides the reporting requirements aren’t worth the trouble.”

## *Waterkeeper Alliance v. EPA* (D.C. Cir. 2017)

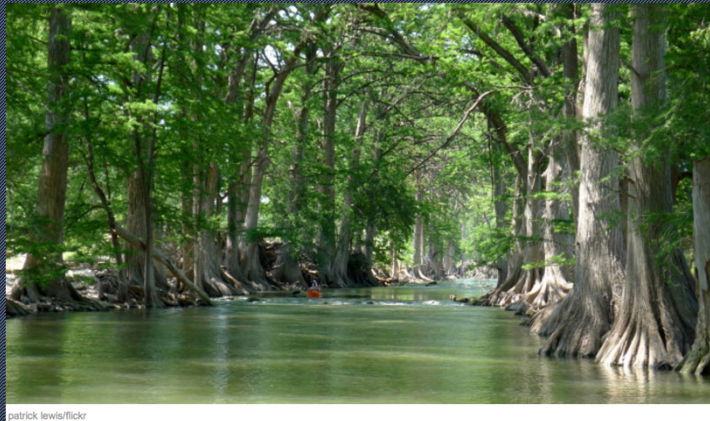
- Comments to the rule belie the EPA’s reasoning that a response would be impractical or unlikely
- EPA’s action is not justified as a reasonable interpretation of any statutory ambiguity or implementation of a *de minimis* exception, the Rule is vacated.
- Court issued its mandate on May 2, 2018

## Fair Agricultural Reporting Method (FARM) Act

- March 23, 2018, Congress passed FARM Act as part of appropriations package
- Exempted reporting of “air emissions from animal waste at a farm under CERCLA
- August 1, 2018—EPA published final rule revising regulations to reflect vacatur of 2008 rule and incorporating necessary revisions to CERCLA enacted by FARM Act.

## CERCLA Manure Litigation

- *City of Tulsa v. Tyson Foods, Inc.*
  - Summary Judgment Order March 14, 2003
- *City of Waco v. Schouten Dairy et al*
  - 14 dairies total
  - Case settled January 2006
- *State of Oklahoma v. Tyson et al*
  - Filed June 13, 2005
  - Still pending
  - Contained a RCRA claim
- *EPA et al (DOJ, TX, OK) v. Mahard Egg Farm, Inc.*
  - Consent Decree entered August 10, 2011



## CWA Regulation of Groundwater Discharges

## Proposed Clean Water Act Definition of “Waters of the United States”

- Clarification is needed in wake of *Rapanos*
- EPA and Army Corps of Engineers jointly released new rule to clarify protection under the CWA for streams and wetlands that form the foundation of the nation’s water resources.
- New Rule adopts “Significant Nexus” test in definition of Waters of the U.S.
- New Rule was issued on May 27, 2015 and became effective August 28, 2015.



## WOTUS Continues to Evolve

- EPA and ACE seeking input from governors of all 50 states in rewriting the rule
- EPA Administrator Pruitt quoted as saying they are “restoring states’ important role in the regulation of water”
- November 16, 2017—EPA and ACE proposed new rule adjusting the “applicability date” for the new WOTUS rule.
  - Delays applicability for two years after this proposed change is finalized to “minimize confusion as we continue to receive input from across the country on how we should revise the definition of the “waters of the United States.”
  - Intended to combat possible lifting of the 6<sup>th</sup> Circuit stay by the Supreme Court with a ruling expected from the Court in coming months.
  - If approved, proposed rule would delay effectiveness of new WOTUS rule until 2020 (almost five years after the original August 28, 2015 effective date).

## WOTUS Litigation

- Earlier this year, EPA announced new rule extending applicability date of the rule to February 6, 2020, providing time to repeal and replace the rule before it goes into effect.
- August 2018, federal judge in South Carolina issued a nationwide injunction of the February 2020 WOTUS applicability rule, thereby making the 2015 WOTUS rule immediately effective in 26 states.
- September 12, 2018, federal judge in Galveston, Texas issued preliminary injunction in the Texas WOTUS cases staying application of the 2015 WOTUS rule in Texas, Louisiana, and Mississippi until final resolution of the cases.
  - Galveston Court declined to issue nationwide injunction

## WOTUS Litigation

- September 26, 2018—Industry groups ask Georgia district court to extend its previous injunction to remaining 22 states where rule is now in place.

## *Ky. Waterways Alliance v. Ky. Utils. Co.* (E.D. Ky., Dec. 28, 2017)

- Kentucky Utilities (KU) operates a three-unit coal-fired power plant along the Dix River
- Coal combustion residuals routinely disposed of in settling or treatment ponds, with the main pond being unlined
- In 2011, KU applied for landfill permit, and included a groundwater assessment plan (GWAP)
- Environmental groups argued GWAP revealed settling ponds were contaminating groundwater and opposed permit
- Kentucky gave conditional approval and environmental groups brought citizen suit

## *Ky. Waterways Alliance v. Ky. Utils. Co.* (E.D. Ky., Dec. 28, 2017)

- Issue: Whether discharges into groundwater that is hydrologically connected to navigable waters constitute the addition of any pollutant to navigable waters from any point source under the CWA.
- Holding: No. Court found that the discharge of pollutants to a navigable water via hydrologically connected groundwater is not subject to the CWA's NPDES permit requirement
- Groundwater not a navigable water under CWA



## *Hawaii Wildlife Fund v. County of Maui -- F.3d--(Feb. 1, 2018)*

- County owns and operates 4 wells at WW Treatment Facility
  - Initially built for backup disposal method of water reclamation but has become County's primary means of effluent disposal into groundwater and Pacific Ocean
  - County injects 3-5 million gallons of treated WW per day into groundwater wells
  - "roughly equivalent of installing a permanently-running garden hose at every meter along the 800 meters of coastline."

## *Hawaii Wildlife Fund v. County of Maui -- F.3d--(Feb. 1, 2018)*

- Trial court granted summary judgment against County
  - County indirectly discharged a pollutant into the ocean through a groundwater conduit
  - The groundwater is a "point source" under the CWA
  - The groundwater is a "navigable water" under CWA
- Ninth Circuit compared wells to stormwater drain system
  - Declined to decide whether groundwater is a "navigable water"
  - Rather, "assumed without deciding" that groundwater is not a navigable water
  - Notably, the court's opinion hints that the court would find groundwater to be navigable when the "significant nexus" test of *Rapanos* is met.

## *Hawaii Wildlife Fund v. County of Maui* -- F.3d--(Feb. 1, 2018)

- Ninth Circuit Affirmed and held County liable under CWA because:
  - County discharged pollutants from a point source
  - 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
    - Disagreed with the district court that “liability under the CWA is triggered when pollutants reach navigable water, regardless of how they get there.”
  - The pollutant levels reaching navigable water are more than de minimis

## *Hawaii Wildlife Fund v. County of Maui* -- F.3d--(Feb. 1, 2018)

- Considered whether well disposal must be permitted under NPDES program
  - Court says “Yes.”
  - The CWA does not categorically exempt all well disposals from the NPDES requirements
- Bottom line—CWA applies and NPDES permit required because the County:
  - Discharged pollutants from a point source
  - 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 a navigable water, and
  - The pollutant levels reaching the navigable water are more than de minimis

## Sierra Club v. Virginia Electric & Power Co. (Sept. 12, 2018—4<sup>th</sup> Cir)

- Concerned arsenic from coal ash percolating into groundwater through precipitation and then to navigable waters
- Case brought under RCRA and CWA
- Question presented is whether the landfill and settling ponds serve as “point sources” because they allow precipitation to percolate through them to the groundwater, which then carries arsenic to navigable waters.
- Court found no CWA application because not landfill and settling ponds were not point sources
- Court found RCRA could apply because coal ash waste and coal combustion residuals are nonhazardous waste subject to RCRA regulation

## Tennessee Clean Water Network v. Tennessee Valley Authority ( 6<sup>th</sup> Cir. Sept. 24, 2018)

- Tennessee Clean Water Network brought suit against the Tennessee Valley Authority and alleged that the Authority violated the Clean Water Act by discharging coal ash wastewater into a nearby river via leaks in a man-made pond that allowed the pollutants to enter groundwater that flowed into the river.
- On appeal, the Sixth Circuit Court of Appeals held that discharging pollutants into groundwater that later carries those pollutants into a navigable water is not an issue within the purview of the CWA. The court explained this was because the pollutants are coming from the point source that discharged the pollutants into the groundwater, and that the groundwater itself is a non-point source conveyance.
- The court acknowledged that pollutants being discharged into groundwater that later enters navigable waters may present environmental issues, but the court concluded the CWA is not the correct legal tool to address these issues.

## EPA Seeking Comment on CWA Coverage of “Discharge of Pollutants” via a Direct Hydrologic Connection to Surface Water

- Comment Period closed May 21, 2018
- Seeking comment on EPA’s previous statements regarding the CWA and whether pollutant discharges from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow that has a direct hydrologic connection may be subject to CWA regulation
- Seeking comment on whether EPA should consider clarification or revision of statements and how it should be provided.

## Herbicide Residue in Manure



## Symptoms of Possible Herbicide Injury

- Poor seed germination
- Death of young plants
- Twisted, cupped, and elongated leaves
- Misshapen fruit
- Reduced yields
- \*\*Diseases, insects, and/or herbicide drift may also be a cause\*\*



## Herbicide Persistence and Residue

- Herbicide half-lives vary depending on soil type, rainfall amount, soil temperature, and other factors
- Some herbicides will breakdown in as few as 30 days, while some may take several years to completely deactivate
- Hay harvested from pastures treated with herbicides
- These herbicides are capable of retaining activity after passage through animal's digestive tracts
- Manure from these animals may contain residual herbicide levels that are high enough to damage broadleaf plants



## Recommendations

- **If you sell hay-**
  - Make sure you know what herbicides have been used
  - Communicate (verbally and in writing) if manure is not suitable for use as a fertilizer or compost for broadleaf plants
- **If you sell manure-**
  - If you buy forages, ask the seller which herbicides, if any, were used
  - Legumes present in hay (potential indicator that broadleaf herbicide not used)
  - If herbicides were used, recommend that buyers of manure spread it on grass pastures or hayfields



## Other Challenges Facing Agriculture

## Iowa Air Emissions

- Iowa is top hog-producing state in U.S.
- Residents sued state over air emissions from the farms
- Iowa Alliance for Responsible Agriculture and some state legislators calling for moratorium on any expansion or construction of AFO until statewide CAFO rules are strengthened

## Wisconsin Dairy Challenges

- Wisconsin dairy has met significant challenges since it proposed construction in 2012
- Dairy won two separate lawsuits to allow the construction of 5,300-cow dairy
- Citizens continue to challenge through environmental permitting process
- Complicated by recent findings that 40% of wells in two cities in Wisconsin were found to contain unsafe levels of nitrates

## Ohio Executive Order

- Ohio Governor John Kasich issued an executive order in July 2018 directing state agencies to take “aggressive new action” toward reduction of nutrient runoff from watersheds in Lake Erie Western Basin

## CAFO Siting Laws

- CAFO siting laws standardize requirements for CAFOs where local governments may choose to require additional permits for operation
- On the rise in multiple states
- In Wisconsin, Livestock siting law sets standards and procedures to be used when local governments choose to require conditional use or other permits of CAFOs
  - Also provides for review board to hear appeals of local decisions

## Agriculture in the Age of Social Media

- Fewer consumers are familiar with or participate in agriculture
- Many consumers turn to social media for education and information on all types of subjects, including food
- Big corporations like Chipotle have skillfully used social media and specially-targeted advertising campaigns to attack large-scale agriculture
- Environmentalists posing as farm employees secretly videotape operations and post on social media



## Strategies for Addressing Rising Threats to Agriculture

## Strategies for Addressing Rising Threats

- Right to Farm Statutes strengthened and enforced
- National coordinated defense of farms developed
- To combat risks of *Cow Palace*, agriculture should lobby Congress to clarify intent of RCRA and for exemption of animal waste generated by agricultural operations
- Agricultural producers must start winning in the court of public opinion
  - Savvy use of social media and targeted advertising and educational campaigns

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