MESSAGE FROM THE CHAIRS
Todd Janzen and Donald Anderson

This year’s joint edition on agricultural environmental litigation covers an exciting range of news and views on where agriculture is heading in the 21st century, and the litigation that is circling around that rapid pace of improvement.

In keeping with past tradition, litigation and agriculture committees once again link our content and practitioner authors together for a joint newsletter of the ABA SEER’S Agriculture Management and Environmental Litigation and Toxic Torts Committees. First, Emily Lyons (Vermont Law School) updates us on various litigation issues in “Case Law Update.” Second, Megan Galey, Agricultural Management membership co-vice chair (corporate-firms), profiles pending Clean Water Act cases.

The 43rd Spring Conference in Salt Lake City had content of interest to both our committees. From the litigation perspective, we had program content on Supreme Court decisions and on government agency guidance in litigation with sessions entitled “Agency Guidance in Litigation: Coping Mechanisms” and “Supreme Court Review: Narrowing Decisions on Water, Air and Jurisdiction”. From the agricultural management perspective, sessions on hot topics in water quality touched on our action issues.

SEER volunteers headed to the EcoGarden where they got their hands dirty spreading mulch, weeding, weed whacking, and picking up garbage at TreeUtah’s EcoGarden. The EcoGarden is a permaculture orchard next to the Day Riverside Library, and is the only garden of its type in Utah. It is a community resource along the Jordan River in Rose Park that demonstrates how we can utilize trees in urban landscapes for organic gardening, food, and to benefit our social and natural environments. Participating individuals learned about permaculture and the benefits the EcoGarden brings to local communities in addition to all the benefits trees provide.

We would also like to urge our members to consider attending the upcoming 22nd Fall Conference of SEER in Miami. This conference will have more sessions designed for litigation attorneys and agricultural environmental lawyers, with the TMDL litigation on tap for another round. (i.e., the Clean Water Act issues profiled in Megan Galey’s timely article). Come and join the fun in Miami.

Todd Janzen is a partner at the law firm of Plews Shadley Racher & Braun LLP in Indianapolis and is chair of the Agricultural Management Committee. Donald D. Anderson is a partner at the law firm McGuireWoods LLP in Jacksonville, Florida, and is chair of the Environmental Litigation and Toxic Torts Committee.
In this issue:

Message from the Chairs
Todd Janzen and Donald Anderson ........................................ 1

Case Law Update
Emily R. Lyons .......................................................... 3

The Role of Water Quality Trading in Total Maximum Daily Load Programs
Megan Galey ........................................................... 10

Copyright © 2014. American Bar Association. All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior written permission of the publisher. Send requests to Manager, Copyrights and Licensing, at the ABA, by way of www.americanbar.org/reprint.

Any opinions expressed are those of the contributors and shall not be construed to represent the policies of the American Bar Association or the Section of Environment, Energy, and Resources.

For full details, please visit www.ambar.org/EnvironCalendar
CASE LAW UPDATE
Emily R. Lyons

TMDL Wars Heating Up

On January 7, 2014, the U.S. District Court for the Northern District of Florida granted the Environmental Protection Agency’s (EPA’s) motion to amend a consent decree between EPA and environmental interest groups who sued in 2008 to require EPA to develop numeric nutrient criteria for Florida’s waters. This means that federal rulemaking for nitrogen and phosphorus pollution in Florida’s waterways is discontinued, and the Florida Department of Environmental Protection (FDEP) can now implement what it calls “the most comprehensive numeric nutrient criteria in the nation.”

Fla. “Thrilled” over Judge’s Nutrient Criteria Order, Florida Realtors (Jan. 9, 2014), http://www.floridarealtors.org/NewsAndEvents/article.cfm?id=301854. Over the objections of the environmental interest groups, the court found that there was a significant change in factual conditions and law when FDEP adopted comprehensive nutrient criteria to comply with the Clean Water Act (CWA).

In 2008, environmental interest groups filed suit claiming that EPA formally determined that states must set states to develop numeric nutrient criteria to comply with the CWA in a 1998 guidance document. EPA initially defended this suit; however, in 2009 EPA explicitly determined that Florida needed to use numeric nutrient criteria to meet the CWA requirements.

Eventually, EPA and the environmental interest groups entered into a consent decree, which required EPA to propose and adopt, in two phases, numeric nutrient criteria for Florida waters. The consent decree explicitly provided that EPA was not required to propose or adopt standards if FDEP proposed its own numeric criteria and it was approved by EPA. In November 2010, EPA adopted the phase 1 numeric criteria. In June 2012, FDEP submitted to EPA a set of numeric and narrative criteria, which EPA approved on November 30, 2012. EPA then petitioned the court to amend the consent decree because of a change in factual conditions and law. The environmental interest groups opposed the amendment and moved for enforcement of the original consent decree.

The CWA provides for the restoration and maintenance of “the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). The CWA allows states to adopt its own water quality standards, subject to EPA’s approval. Id. at 1251(b). A state is allowed to set water quality criteria that are numeric, narrative, or both.

According to Federal Rule of Civil Procedure 60(b), a court may modify a consent decree if the consent decree is no longer equitable or other reasons justify modification. Courts allow for modification of consent decree if (1) a significant change in factual condition or law exists and (2) the proposed modification is suitably tailored to the changed circumstances. Rufo v. Inmates of Suffolk Cnty. Jail, 502 U.S. 367, 391 (1994). The court found that EPA and FDEP met both of these requirements because FDEP adopted new criteria that meet the requirements of the CWA and because enforcing the consent decree would be inconsistent with the approval of FDEP’s new criteria.

The environmental interest groups argued that EPA could not justify the modification because the change in circumstances was wholly within EPA’s control. The court rejected this argument, stating that Rufo and rule 60(b) do not require the circumstances to be out of a party’s control. Further, the development and approval of FDEP’s numeric nutrient criteria are consistent with the CWA’s mandate that states primarily establish water quality standards.

On September 20, 2013, the U.S. District Court for the Eastern District of Louisiana held that the Environmental Protection Agency (EPA) must make a necessity determination in response to
environmental interest groups’ rulemaking petition that requests EPA to set numeric nutrient criteria for the Mississippi River Basin (MRB). The court stated that “EPA cannot ignore a specific statutory mandate that expressly curtails the exercise of its discretion when it denies a request for rulemaking.”

In July 2008, environmental interest groups petitioned EPA for a rulemaking under the Clean Water Act (CWA) section 303(c)(4). The groups requested that EPA use its rulemaking powers to promulgate federal standards to control nitrogen and phosphorous pollution in the MRB and Gulf of Mexico.

In July 2011, EPA issued a formal response to the rulemaking petition. EPA denied the groups’ request for EPA to use its rulemaking authority because in EPA’s judgment the most effective way to deal with the MRB nutrient pollution was through building on its previous efforts. EPA also explained that the complexity and resource intensity of the groups’ request prevented EPA from taking the proposed action.

In March 2012, the environmental interest groups sued EPA stating that EPA’s denial is not supported by section 303(c)(4)(B)’s factors and the denial was contrary to the evidence that numeric nutrient criteria are necessary to meet the requirements of the CWA.

Relying on the U.S. Supreme Court’s decision in Massachusetts v. EPA, 549 U.S. 497 (2007), the environmental interest groups argued that the CWA clearly obligates EPA to determine whether numeric nutrient criteria are necessary to meet the CWA’s water quality requirements. Citing the similarities between Massachusetts v. EPA and this case, the court agreed. The court stated that “EPA lacks the discretion to simply decline to make [a] threshold determination in response to a rulemaking petition even where the statutory test does not explicitly require it to do so.

The group also argued that Massachusetts v. EPA established that CWA section 303(c)(4)(B) necessity determinations must be based on scientific and technical criteria. The court rejected this claim. The court states that EPA does not need to base every discretionary determination upon scientific data and can cite reasons outside of section 303(c)(4)(B). Further, the court remarked that “[n]othing in the authorizing statutory text of the CWA expressly precludes EPA from considering the very factors cited in the denial.”

The court also emphasized the state’s important role in adopting water quality standards for its territorial waters and EPA’s role in oversight. The court stated that “the necessity determination in § 303(c)(4)(B) of the CWA is more than a mere speed bump on federal regulation because by design it serves as a hurdle to federal jurisdiction—a hurdle that EPA must overcome before it preempts a state’s sovereign authority to regulate its own waters.”

The court remanded the petition for rulemaking to EPA for a necessity determination within 180 days for the decision.

**Board of Commissioners of Fairfield County v. Koncelik, No. 11-AP-508 (Ohio 10th Dist. Ct. App. May 23, 2013)**

On May 23, 2013, the Ohio Tenth District Court of Appeals of Franklin County held that the National Pollutant Discharge Elimination System (NPDES) that includes water quality-related effluent limitations must include a technical feasibility and economic reasonableness analysis. However, the director of the agency has broad discretion in determining how to conduct the analysis.

In 2005, Fairfield County applied to the Ohio Environmental Protection Agency (OEPA) for a renewal of its Tussing Road wastewater treatment plant’s NPDES permit. OEPA issued public notice of a change to the permit that included a limit for TP, Total Dissolved Solids (TDS) and monthly loading. Fairfield County submitted comments stating that these limits should be removed due to technological infeasibility and burdensome costs. OEPA issued the final permit with the limits.

Fairfield County appealed the permit decision to the Environmental Review Appeals Commission.
(ERAC). Fairfield County argued that OEPA, in disregard of the state Clean Water Act, failed to consider technical feasibility and economic reasonableness of removing polluting properties prior to issuing the permit. See ORC 6111.03(J)(3). The ERAC found that OEPA could impose both a TP and TDP limit; however, an analysis of technological feasibility and economic reasonableness should be analyzed prior to the issuance of a NPDES permit.

Both OEPA and Fairfield County appealed this decision. On appeal, the court found that OEPA could set a limit for both TP and TDS. The court found sufficient factual support for the TP limit because the limit was consistent with the total maximum daily load report for the watershed in which the wastewater treatment plant is located. The court also found sufficient factual support for the TDS limit because the limit was supported by reliable, probative, and substantial evidence that met the statewide water quality standards. Further, the court agreed with the ERAC that OEPA must conduct a technological feasibility and economic reasonableness analysis prior to issuing a water quality-related effluent limitation in a NPDES permit, even if the federal Clean Water Act does not require one.

The court remanded the permit back to OEPA for revaluation of the TP and TDS effluent limits to include a technical feasibility and economic reasonableness analysis.

Stormwater Runoff from Agriculture Exempt?


On October 23, the U.S. District Court for Northern District of West Virginia held that the Environmental Protection Agency (EPA) cannot require farmers to obtain a section 402 of the Clean Water Act (CWA) National Pollutant Discharge Elimination Systems (NPDES) permits for stormwater runoff from the farmyard that contains litter and manure. These stormwater discharges are exempt from the NPDES permit requirements as they are covered by the agricultural stormwater exemption.

In June 2012, Ms. Alt, the operator of eight poultry confinement houses in West Virginia, filed a lawsuit challenging EPA’s authority to require her to obtain an NPDES permit for discharges associated with stormwater comingle with dust, manure, and feathers from the confinement houses’ ventilation fans in the farmyard area between her poultry houses. The precipitation was carried across a grassy pasture and into Mudlick Run, a water of the United States. EPA issued Ms. Alt a compliance order that found that the poultry production facility is a concentrated animal feeding operation (CAFO) that discharged pollutants into Mudlick Run without having an NPDES permit. EPA ordered Ms. Alt to apply for a NPDES permit and threatened civil and criminal penalties if she refused to comply.

**Summary of Statutory History**

The CWA generally prohibits the discharge of pollutants from point sources into waters of the United States. While Congress designated CAFOs as point sources under the CWA, Congress also specifically exempted “agricultural stormwater discharges” from the definition of “point sources” of pollution. 33 U.S.C. § 1362(14). EPA has repeatedly attempted to require CAFOs to require NPDES permits; however, federal courts have twice invalidated EPA regulations that attempted to impose permitting requirements on CAFOs. See *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2d Cir. 2005) and *Nat’l Pork Producers Council v. EPA*, 645 F.3d 748 (5th Cir. 2011).

On cross motions for summary judgment, the court sided with Ms. Alt. The court found that because neither Congress nor EPA defined the term “agricultural stormwater discharges,” the court should afford the term its ordinary meaning. Following the Second Circuit’s definition, the court concluded that the “poultry operation is agricultural in nature and that the precipitation-caused runoff from the farmyard is ‘stormwater.’” See *Waterkeeper Alliance*, 399 F.3d at 508.
The court also determined that the agricultural stormwater exemption extends to areas beyond the land application area. In particular, the district court stated that the areas between poultry houses are clearly not animal confinement areas, which the exemption does not cover, and that manure and litter in the farmyard “would remain in place and not become discharges of a pollutant unless and until stormwater conveyed the particles to navigable waters.”

The court also rejected the argument that the stormwater from a CAFO production area is not entitled to the exemption because it is industrial rather than agricultural. Applying the Second Circuit’s Waterkeeper decision, the court concluded that CAFOs should be viewed as agricultural not industrial. See Waterkeeper, 399 F.3d 486 at 506. Additionally, the court noted that the Second Circuit also found that a primary impetus behind the agricultural stormwater exemption was an explicit desire to exclude agricultural operations from regulation under the stormwater program. See Concerned Area Residents for the Env’t v. Southview Farm, 34 F.3d 114, 120 (2d Cir. 1994).

On December 20, 2013, the environmental groups Food and Water Watch, Potomac Riverkeeper, Waterkeeper Alliance, Center for Food Safety, and the West Virginia Rivers Coalition, who intervened on behalf of EPA, filed a notice of appeal. On December 23, 2013, EPA also filed a notice of appeal.


On January 4, 2013, the North Carolina Superior Court for Hyde County held that the North Carolina Department of Environment and Natural Resources (NCDENR) has the authority to require an egg farm to obtain a National Pollutant Discharge Elimination System (NPDES) permit to prevent airborne pollutant from reaching state waters. The court found that the Clean Water Act’s (CWA’s) agricultural stormwater exemption does not exempt these discharges because the exemption only applies to manure, litter, or process water that has been land applied. See 40 C.F.R. § 122.23.

In March 2009, Rose Acre Farms (Rose Acre), an egg production facility in Hyde County, North Carolina, applied for a NPDES permit renewal with the NCDENR. Following a public comment period, NCDENR issued a renewal to Rose Acre’s NPDES permit that authorized the continued operation of the facility and its animal waste and process wastewater, treatment, storage, and land application systems. In the renewed permit, Rose Acres was also required to implement amended best management practices (BMP) to prevent dust, feathers, and ammonia from the confinement houses’ ventilation fans from entering state waters. Rose Acre challenged NCDENR’s authority to require it to obtain a NPDES permit and NCDENR’s authority to impose the BMP directive contained in the renewed permit.

Relying on the Fifth Circuit’s decision in National Pork Producers Council v. EPA, 635 F.3d 738 (5th Cir. 2011), the court found that NCDENR has the authority “to impose a duty to apply [for a NPDES permit] on CAFOs that are discharging.” Id. at 751. Therefore, NCDENR could require Rose Acre to apply for a NPDES permit if it is (1) a point source that is (2) actually discharging a pollutant to a water of the state. Due to its size, type of operation, and manure handling system, the court stated that Rose Acre is a point source. See 40 C.F.R. § 122.23. The court found that the CWA's listing of pollutants is not exhaustive and should be broadly interpreted. See Rapanos v. United States, 547 U.S. 715, 723 (2006). Following the Sixth Circuit’s decision in National Cotton Council of America v. EPA, 553 F.3d 927 (6th Cir. 2009), the court found that “biological ammonia, nitrogen, and fecal coliform carried by feathers and dust and expelled by the cooling fans of the hen houses [] could constitute ‘biological material.’”

The court found a question of fact as to whether the dust, ammonia, and feathers, which fall on a grassy area between the egg houses, drain to the facility’s retention pond, stormwater ponds, or waters of the United States during precipitation events. The court
affirmed the final agency decision to require Rose Acre to obtain a NPDES permit and remanded the matter back to the Office of Administrative Hearings for an evidentiary hearing to determine the validity of Rose Acre’s NPDES permit.

**Ag Tile Drains Are Not a Point Source Under Clean Water Act**


On September 16, 2013, the U.S. District Court for the Eastern District of California held that tile drains are not a point source of pollution even if the outflow contains possibly polluted groundwater.

In November 2011, the Pacific Coast Federation of Fisherman’s Associations (PCFFA) sued the Bureau of Reclamation (BR) alleging that the Grasslands Bypass Project (GBP) violates the Clean Water Act because the project discharges pollutants into nearby jurisdictional waters of the United States without a National Pollutant Discharge Elimination System (NPDES) permit. The GBP is a tile drain irrigation system that collects irrigation and groundwater to prevent saturating crop roots in the San Joaquin Valley.

PCFFA contented that the GBP is a point source because it is not a “return flow from irrigated agriculture.” PCFFA also argued that the CWA does not exempt the discharges because they come from the tile drains containing groundwater, which could be contaminated with pollutants such as selenium, and not “entirely” composed of irrigation water. The BR contented that the discharges fall into the plain meaning of “return flow from irrigated agriculture” and are therefore a nonpoint source and do not require a NPDES permit. See 33 U.S.C. §§ 1362(14) and 1342(1)(1).

The court agreed with BR. The court stated that “Congress used the broad term ‘return flows from irrigated agriculture’ because it intended to exempt drainage from farms practicing crop-producing agriculture facilitated by irrigation, rather than focusing on what the components of a particular flow are on any given day.” The court construed the word “entirely” to “limit the exception to those flows which do not contain additional discharges from activities unrelated to crop production.”

The court dismissed PCFFA’s claim because PCFFA did not plead adequate facts to support a claim that the amount of the discharges is unrelated to crop production; however, the court granted PCFFA leave to file an amended complaint. PCFFA filed its amended complaint on October 7, 2013.

**Pollution Exclusion Not Applicable to Hog Odor Nuisance Case**


On November 13, 2013, the Illinois Fourth District Appellate Court held that odors associated with the operation of a confinement hog farm and the land application of manure from the farm do not constitute “traditional environmental pollution.”

Thus, coverage for lawsuits involving odor nuisance is not barred under an “absolute pollution exclusion” clause contained in an insurance policy.

In May 2008, neighbors of Hilltop View, LLC (Hilltop) filed a complaint alleging nuisance and negligence associated with odors from Hilltop’s hog farm. Later that month, Hilltop notified Country Mutual Insurance Company (Country), its insurance provider, of the suit seeking coverage for defense of the neighbors’ lawsuit. Country filed a complaint for declaratory judgment alleging it had no duty to defend or indemnify Hilltop in the neighbors’ lawsuit due to its pollution exclusion clause contained in its umbrella policy. Following a hearing on partial cross motions for summary judgment, the trial court denied Country’s motion for partial summary judgment that the pollution exclusion bars coverage under the umbrella policy, granted Hilltop’s cross motion for partial summary judgment, and stated that Country was responsible for Hilltop’s defense under the umbrella policy.

In Illinois, pollution exclusion clauses only apply to injuries caused by “traditional environmental
pollution.” Am. State Ins. Co. v. Koloms, 177 Ill. 2d 473, 494, 687 N.E.2d 72 (1997). Therefore, the court must look to see if the complaint’s underlying claims concern “traditional environmental pollution.” Few cases have interpreted what constitutes “traditional environmental pollution”; however, the court found the Illinois cases defining the term distinguishable because they involved “nonnaturally occurring chemicals.” Additionally, the court noted “the fact that a material is hazardous in certain situations does not always justify a label it constitutes a ‘hazardous material.’ Manure is one such material.”

The court found that the neighbor’s nuisance and negligence claims about odor do not appear to claim that Hilltop is “polluting the environment in the traditional sense of the word.” Further, hog farms “have been traditionally through of as a source of food, not pollution.” The court could not find support in Country’s claims that the Illinois Livestock Management Facility Act, 510 ILCS 77/20(f) (2010), and the Illinois Environmental Protection Act, 415 ILCS 5/3.115 (2010), treat odors as air pollution.

The court affirmed the trial court’s denial of Country’s motion for partial summary judgment, granting of Hilltop’s cross motion for partial summary judgment, but reversed the court order requiring Country to defend Hilltop because all of Country’s defenses in the declaratory judgment action are still pending before the trial court.

Oregon “Right to Farm” Law Upheld

On November 14, 2013, the Court of Appeals of the state of Oregon rejected a constitutional challenge to Oregon’s “Right to Farm and Right to Forest Act” law (Right to Farm law). The court held that it lacked jurisdiction because the claim was not a justiciable controversy.

In 2008, Hale, an organic farmer, sued his neighbors because of their use of pesticides and other chemicals that Hale alleged migrated onto his property and his person. The neighbors raised an affirmative defense under the Right to Farm law, which provides immunity to property owners who are sued for trespass or nuisance as a result of their agricultural practices, unless the practice allegedly causes death or serious injury. See ORS 30.936. Hale then voluntarily dismissed his action.

In this case, Hale sued the state of Oregon seeking a declaratory judgment that the Right to Farm law deprived him of a remedy in violation of the Oregon Constitution. The trial court dismissed the case with prejudice because Hale did not state a justiciable claim.

For a court to grant a declaratory judgment, the complaint must state a justiciable controversy. To satisfy this requirement, a complaint must present facts, not an issue based on future events, and the controversy must result in specific relief through a binding decree; the decree cannot simply be a binding advisory opinion. Pendelton Sch. Dist. v. Oregon, 345 Or. 596, 604, 200 P.3d 133 (2009).

The court held that Hale’s action did not satisfy this requirement. The court could not provide Hale specific relief through its decision because his neighbors were not a party to the action and could not be bound by the decision in a future case. Thus, the court found Hale’s claims “too speculative” because Hale declaring the Right to Farm law unconstitutional had no material impact upon Hale.

California Egg Laws Challenged

On February 3, 2014, Chris Koster, the attorney general of Missouri, sued California Attorney General Kamala Harris. Koster seeks to enjoin the enforcement of California laws that regulate egg-laying hen housing for California farms as well as those in other states that sell their eggs in California. Koster claims that these laws violate the Commerce Clause of the U.S. Constitution and encroach on Missouri’s sovereignty.
In 2008, Californian voters approved Proposition 2, a ballot initiative that required egg-laying hens, pigs, and calves be raised in facilities with enough space to allow the animal to lie down, stand up, turn around, and fully extend their limbs. To protect California farmers from out-of-state competition, in 2010 the California State Assembly passed AB1437 that requires egg producers in other states to comply with Proposition 2 in order to sell eggs in California. The California State Assembly justified this law by stating they were concerned with protecting people from salmonella and other illnesses.

Koster alleges that Proposition 2 forces Missouri egg farmers to “incur massive capital improvement costs to build larger habitats” for Missouri’s seven million laying hens. Koster further asserts that California violates the Commerce Clause by regulating agricultural practices outside of California and erecting a barrier to “the flow of goods across state lines [based] on the method of their production.” Finally, Koster states that the Egg Product Inspection Act preempts California’s laws.

Emily R. Lyons is a 2014 JD candidate at Vermont Law School and has a BS with honors from the University of Illinois. She may be reached at emilylyons@vermontlaw.edu.
A central feature of the Clean Water Act (CWA) is the preservation of state power to develop regulations or enforceable standards for nutrient runoff from agricultural nonpoint sources. Yet, few states have opted to do so. Most states have favored encouraging agricultural sources to voluntarily adopt conservation practices. Without a notable improvement in water quality in agriculturally dominated watersheds, there is an increased interest in total maximum daily load (TMDL) programs and market-based policy mechanisms as an alternative approach to managing water quality that can also accommodate economic growth and development.

Market-based programs were first developed by the U.S. Environmental Protection Agency (EPA) under the Clean Air Act (CAA). In the mid-1970s, EPA developed a CAA offsetting policy that allowed new sources and existing sources planning major modifications in nonattainment areas to offset their emissions by acquiring emission reduction credits from existing sources. This led to the sulfur dioxide allowance-trading component of the Acid Rain Program authorized under the Clean Air Act Amendments of 1990. The success of the CAA sulfur dioxide trading program led EPA and the U.S. Department of Agriculture (USDA) to develop trading programs for nitrogen, phosphorus, and sediment emissions into water under the CWA. The CWA does not contain the CAA’s express authority for trading programs, but the EPA has found enough implicit room in its statutory authority to proceed.

This article begins with an introduction to water quality trading programs. It then discusses trading programs for nitrogen, phosphorus, and sediment in two regions that have been heavily impacted by nutrient over-enrichment, the Mississippi-Atchafalaya River Basin and Chesapeake Bay watershed. I conclude with an analysis of the controversy surrounding the present and future use of trading programs under the CWA.
The new policy provided greater flexibility in the implementation of trading programs for nitrogen, phosphorus, and sediment pollution by allowing pre-TMDL trading in addition to trading under a TMDL. Under the policy, pre-TMDL trading programs could eliminate the need to develop a TMDL if trading resulted in the attainment of applicable water quality standards. EPA also recommended that trading programs periodically assess their environmental and economic effectiveness by documenting nonpoint source load reductions, validating nonpoint source removal efficiencies, and determining whether water quality standards were being met as intended.

To encourage agricultural producers to participate in water quality trading, EPA began a collaborative effort with USDA Natural Resources Conservation Service (NRCS) in 2006. The two agencies entered into a new partnership agreement in November 2013. See Partnership Agreement Between USDA and EPA Regarding Water-Quality Trading. As a result of the availability of federal grants for market-based water quality initiatives from EPA and USDA, as well as EPA’s increased focus on the development of TMDLs in the mid-1990s in order to comply with multiple consent decrees, pilot trading projects were created across the country.

Despite the potential benefits of water quality trading, relatively few successful trading programs have been established. EPA reported in October 2008 that only 100 facilities had participated in water quality trading and 80 percent of trades had occurred within a single trading program. See EPA, Water Quality Trading Evaluation: Final Report (Oct. 2008). Moreover, the report concluded that only a few trading programs had successfully scaled up from pilot projects and even fewer could “claim to have had a significant impact in improving water quality or reducing pollutant control costs.” Id. For point/nonpoint trading programs, a significant body of literature suggests this lack of enthusiasm, in part, stems from the legal risk incurred by point source dischargers that participate in trading.

When an agricultural nonpoint source sells nutrient credits, there is the possibility that the nonpoint source may not fully implement or maintain a conservation practice. The CWA, however, only authorizes EPA to pursue enforcement actions against the point sources that purchased credits to comply with their NPDES permits. As a consequence, permitted dischargers that rely on trading to meet their technology or water quality-based effluent limitations could be strictly liable for violating the discharge limits in their NPDES permits if the CWA’s requirements are not met. This risk may deter point sources from participating in trading. Even though water quality trading programs have not been widely successful, the potential of water quality trading to incorporate nonpoint sources as part of the solution to water quality issues remains largely untapped.

The Mississippi-Atchafalaya River Basin

A point/nonpoint trading program for phosphorus in the Mississippi-Atchafalaya River Basin provides a useful example of how water quality trading can accommodate economic growth and development while also protecting water quality. In response to the Minnesota Pollution Control Agency (MPCA) imposing stricter effluent limitations for nitrogen and phosphorous in National Pollutant Discharge Elimination System (NPDES) permits, the Southern Minnesota Beet Sugar Cooperative (SMBSC) worked with MPCA to incorporate water quality trading provisions into SMBSC’s NPDES permit. See EPA, Water Quality Trading Evaluation: Final Report 2-8 (2008). The permit required SMBSC to annually offset 4982 lbs. of phosphorus by purchasing credits from nonpoint sources and to set aside $300,000 for conservation projects. SMBSC created a trading program to offset its wastewater discharge by paying member-growers to plant cover crops and implement other nitrogen and phosphorous reduction strategies.

As a cooperative with 600 farmer-members, SMBSC was able to find a group of trading partners without incurring high transaction costs. During the first few years, SMBSC obtained a sufficient
quantity of phosphorus credits by contracting with its grower-members to plant wheat and oats as a cover crop. To ensure accountability, MPCA required detailed reports before and after a trade was completed and conducted field audits. MPCA required each report to include engineering plans and specifications for structural work, operation and maintenance plans, and labeled photographs from before and after the implementation of conservation practices. By trading, SMBSC was able to construct a new treatment plant and increase its production output by 40 percent even though new discharges into the Minnesota River were prohibited.

Although small-scale water quality trading programs like SMBSC’s program can help reduce net nutrient loads, the reductions achieved are a small percentage of the overall loadings in large surface waters like the Minnesota River Basin or the Mississippi-Atchafalaya River Basin (MARB). To have a more pronounced impact on water quality requires trading programs to be developed and coordinated at a larger scale. Within the MARB, the Mississippi River Gulf of Mexico Watershed Nutrient Task Force—a collaborative effort consisting of twelve states and five federal agencies—has worked to reduce nitrogen and phosphorus in the river basin and to reduce the size of the gulf hypoxic zone. In a step toward achieving those goals, the task force states have been drafting and implementing state nutrient reduction strategies. See Mississippi River Gulf of Mexico Watershed Nutrient Task Force, Reassessment 2013: Assessing Progress Made Since 2008 (2013). While each state’s nutrient reduction strategy will be tailored to address state-specific water quality conditions, each of the nutrient reduction strategies will include a provision approving of water quality trading programs as a potential nutrient reduction method. Whether task force states ultimately choose to develop additional water quality trading programs remains to be seen.

While EPA was working with states in the MARB to reduce nitrogen and phosphorus runoff, a coalition of environmental organizations challenged EPA’s denial of a rulemaking petition that asked EPA to promulgate numeric nutrient criteria and establish cleanup plans for the states in the MARB. See Gulf Restoration Network v. Jackson, No. 12-677, 2013 WL 5328547 (E.D. La. Sept. 20, 2013).

Acknowledging that nutrient pollution presents significant water quality problems in the MARB, EPA defended its denial of the petition by asserting that the agency was exercising its administrative discretion to allocate its resources to working with states in the MARB, rather than creating federal numeric nutrient criteria for the states. The U.S. District Court for the Eastern District of Louisiana ordered EPA to issue a formal finding regarding whether federal rules are necessary and to complete a revised response to the petition within 180 days. EPA filed an appeal in the U.S. Court of Appeals for the Fifth Circuit on November 18, 2013.

Although the district court’s decision requires EPA to make a threshold determination about necessity, EPA still may decide it is preferable not to set federal numeric criteria despite the absence of aggressive state action due to the complexity, cost, and administrative burden of establishing criteria for multiple states, as well as EPA’s long-standing policy favoring state development of water quality criteria. EPA previously stated that it expects Louisiana and other states to take the lead in addressing water quality issues in the MARB, but states have tended to favor addressing water quality concerns through the process already established under the Mississippi River/Gulf of Mexico Watershed Nutrient Task Force, rather than through a TMDL. Yet, there is concern within the agricultural community that EPA will eventually agree to develop a watershed-wide TMDL for the MARB that is modeled after the Chesapeake Bay TMDL. See, e.g., Danielle Quist, TMDL Regulation, ABA Section of Environment, Energy, and Resources 21st Fall Meeting, Baltimore, MD, October 9–12, 2013. The reason for this concern is that, despite its long-standing policy, EPA awarded a $7.2 million contract to an environmental consulting firm to develop a model to identify concentrations of nitrogen and phosphorus sufficient to meet the water quality standards for the Gulf of Mexico and Mississippi River. See U.S. Senate Committee on
Environment and Public Works, Clouded Waters: A Senate Report Exposing the High Cost of EPA’s Water Regulations and Their Impacts on State and Local Budgets, at 7 (June 30, 2011). If the agricultural sector is correct, the Chesapeake Bay provides a peek of what is to come.

The Chesapeake Bay Watershed

In 1987, the District of Columbia and the seven states whose waters feed the Chesapeake Bay (Bay states) entered into an amended agreement to reduce net nutrient loads and attain a 40 percent reduction in nitrogen and phosphorus in the Chesapeake Bay by 2000. See Chesapeake Bay Program, 1987 Chesapeake Bay Agreement. Once it became evident that the 40 percent reduction would not be attained, the signatories began to consider whether or not developing water quality trading programs could help reduce nutrient loading. The signatories determined that trading would be allowed for discharges into the major tributaries of the Chesapeake Bay from sources that were implementing the 40 percent reduction goal. See, e.g., Ann Powers, The Current Controversy Regarding TMDLs: Contemporary Perspectives, 4 VT. J. ENVTL. L. 1, 10 (2003). Several of the Bay states, including Virginia, Pennsylvania, West Virginia, and Maryland, subsequently developed trading programs to meet the 40 percent reduction.

Meanwhile, EPA collaborated with the Bay states to establish a TMDL for the Chesapeake Bay, a watershed covering 64,000 square miles, in December 2010. The Bay TMDL sets a cap on discharges of nitrogen, phosphorus, and sediment into the watershed, and references trading and offsetting programs as potential methods for implementing the load reduction requirements. For the agricultural community, the Bay TMDL is particularly significant because of its pollutant reduction allocations for nonpoint sources. Independent of the ultimate outcome of Gulf Restoration Network v. Jackson, there is concern within the agricultural community that EPA will eventually agree to develop an interstate, watershed-wide TMDL for the MARB and use the Bay TMDL as a model. See Danielle Quist, TMDL Regulation, ABA Section of Environment, Energy, and Resources 21st Fall Meeting, Baltimore, MD, October 9–12, 2013.

Consequently, the Chesapeake Bay TMDL was quickly challenged in early 2011 in the U.S. District Court for the Middle District of Pennsylvania by the American Farm Bureau and several other industry groups. See Am. Farm Bureau Fed’n v. EPA, No. 1:11-cv-00067-SHR, 2013 WL 5177530 (M.D. Pa. Sept. 13, 2013). The focal point of the American Farm Bureau’s argument was that EPA was required under the CWA to allow the Bay states to determine how to implement the Bay TMDL. Rather than doing so, EPA impermissibly exceeded its limited authority by imposing a detailed allocation scheme, requiring EPA approval of any changes to the scheme, and setting a federally imposed timeline for state implementation.

Emphasizing the high degree of coordination between EPA and the Bay states in developing the TMDL, the district court upheld the TMDL and determined EPA did not exceed its supervisory authority over the implementation of TMDLs under section 303(e) of the CWA. As expected, the American Farm Bureau filed an appeal in the U.S. Court of Appeals for the Third Circuit in October 2013. See Plaintiffs’ Notice of Appeal to the U.S. Court of Appeals for the Third Circuit, Am. Farm Bureau Fed’n v. EPA, No. 11-cv-0067-SHR (3d Cir. filed Oct. 7, 2013). In February 2014, 21 state attorney generals, primarily from the West and MARB states (AL, AK, AR, FL, GA, IN, KS, KY, LA, MI, MN, MO, NE, ND, OK, SC, SD, TX, UT, WV, and WY), joined the American Farm Bureau’s appeal. In their joint amicus brief, the states argue that Congress authorized EPA to establish only a “total load”—not allocations that are enforced through arbitrary deadlines, “reasonable assurance” requirements, and backstop measures. EPA, as noted above, interprets the CWA as allowing the implementation of specific TMDLs for impaired waterways at the state level. This illustrates the importance of the appeal of the Bay TMDL to the pending MARB action in New Orleans (Gulf
Despite the legal uncertainty and potential pitfalls for water quality trading programs, trading can be a powerful market-based tool for incentivizing the implementation of conservation practices that provide water quality improvement benefits, while also accommodating economic growth. If the Chesapeake Bay TMDL and water quality trading programs in the Bay continue to survive judicial scrutiny, the Chesapeake Bay will have significant and far-reaching impacts on water quality policy in the Mississippi-Atchafalaya River Basin for years to come.

Megan R. Galey is an associate with Husch Blackwell LLP in St. Louis and is a vice chair of the Agricultural Management Committee. She may be reached at Megan.Galey@huschblackwell.com.

EPA moved to dismiss the complaint, countering that although it took final action to establish the Bay TMDL and constituent allocations, EPA did not establish a trading or offset program to implement the TMDL; rather, EPA merely described one potential way the states could choose to implement the Bay TMDL. EPA argued that the coalition did not have standing and the administrative action challenged did not constitute final agency action. Two intervenors, the American Farm Bureau Federation and the National Association of Home Builders, also moved for dismissal for lack of standing and failure to challenge a final agency action.

Agreeing with EPA, the district court dismissed the complaint citing lack of standing and final agency action. The court, however, acknowledged the decision does not prevent the coalition from subsequently challenging individual trades or offsets to argue that a point source is discharging at levels exceeding permitted limits in violation of the CWA’s anti-backsliding and anti-degradation requirements. See 33 U.S.C. §§ 303(c), (d)(4) & 402(o); 40 C.F.R. §§ 122–24. Consequently, EPA will likely confront another challenge to the legality of trading programs under the CWA in the near future.