

Welcome to Civil Discourse. This podcast will use government documents to illuminate the workings of the American Government and offer contexts around the effects of government agencies in your everyday life. Now your hosts, Nia Rodgers, Public Affairs Librarian and Dr. John Aughenbaugh, Political Science Professor.

**N. Rodgers:** Hey, Aughe.

**J. Aughenbough:** Good morning, Nia. How are you?

**N. Rodgers:** I'm good. How are you?

**J. Aughenbough:** I am good.

**N. Rodgers:** So, I have a question for you, and I know it's going to sound silly, but I just want you to bear with me for a minute.

**J. Aughenbough:** Okay.

**N. Rodgers:** Do you think that when the founders founded the United States, they thought of the United States would make a really good ending to a lot of alphabetic letters?

**J. Aughenbough:** You're talking about the various and sundry acronyms?

**N. Rodgers:** Yes, SCOTUS, and FLOTUS, and POTUS. POTUS, for instance is President of The United States, and SCOTUS is Supreme Court of the United States.

**J. Aughenbough:** FLOTUS is the First Lady of The United States. Yes.

**N. Rodgers:** You have a new one for us today.

**J. Aughenbough:** I do have a new one. It is WOTUS, W-O-T-U-S. I'm just going to pause. I'm going to let our listeners think, what could that possibly stand for? It is actually Waters of The United States. It is a statutory term that comes from one of the landmark environmental laws in the United States. The Clean Water Act, which was first passed by Congress in 1972 and was reauthorized five years later in 1977.

**N. Rodgers:** I want it noted for the record by the way, that 1972 was under Richard Nixon. People who think that Richard Nixon did not accomplish anything good in the world, you may have reason to believe that, but I counter with the Clean Water Act. I counter with the founding of the EPA. I counter with a lot of things like that, which happened under Richard Nixon. Yes, Watergate, yes, Tricky Dick.

**J. Aughenbough:** Enemies list.

**N. Rodgers:** Yes, talking to portraits and drinking heavily while in the White House. I get it, I get all of that.

**J. Aughenbough:** Exhibiting a level of paranoia that would keep a team of psychiatrists working overtime, all of that may be true. On the other hand, we do not get a coordinated federal government environmental policy if it wasn't for Richard Nixon. Yes folks, he did it for electoral reasons. There was a part of the electorate that he wanted to appeal to. But that's one of those times where politicians narrow self-interest.

**N. Rodgers:** Works out for the rest of us.

**J. Aughenbough:** The collective good, come together in one of those happy public policy rare circumstances. All of that may be true. But Waters of The United States is a statutory term that is rooted in the Clean Water Act.

**N. Rodgers:** I'm hoping we could just say WOTUS a lot during this.

**J. Aughenbough:** I'm hoping that we say it at least 30 times.

**N. Rodgers:** Let's start with the original goal of the Clean Water Act.

**J. Aughenbough:** Okay.

**N. Rodgers:** The Clean Water Act is not like building necessarily water treatment plants, but that's an outcome of it. The intent of it was what?

**J. Aughenbough:** The Clean Water Act, its purpose was to eliminate the discharge or flow of untreated wastewater from both local government and industrial sources into American waterways. For those of you who are like, the Clean Water Act, this must be about safe drinking water. No, that actually comes from a different federal law, which is the Safe Drinking Water Act. The purpose of the Clean Water Act was to address, and maybe Nia, on our resource guide we can find a photo of this. There was in the 1960s, the Cuyahoga River outside of Cleveland caught on fire. The reason why it caught on fire was for decades, industrial sites in the City of Cleveland were basically dumping their wastewater into the river, and it became so polluted that it caught on fire.

**N. Rodgers:** Really, when you stop for just a moment and consider the difficulties of setting fire to regular water.

**J. Aughenbough:** Water.

**N. Rodgers:** The way you said. If you took a glass of water and you tried to set fire to it, you would be unsuccessful from now until the end of time.

**J. Aughenbough:** Yeah, because it requires a chemical process.

**N. Rodgers:** You have to alter the water so much.

**J. Aughenbough:** Because the water is a chemical, if you will, substance, mitigates most of our efforts to build fire.

**N. Rodgers:** Water is non-flammable, generally speaking.

**J. Aughenbough:** Think about how polluted a body of water would have to be.

**N. Rodgers:** To be flammable.

**J. Aughenbough:** To be flammable.

**N. Rodgers:** What that would mean is that it is X part chemical to X part water. The water level in that river has gone so down and the chemical level has gone so up that the river is no longer what we think of as a definition of river, which is a flowing body of water, so much as it was a flowing body of chemicals that happened to have a little bit of water in it.

**J. Aughenbough:** This is where the chemical scientists are talking about. So many parts this versus so many parts of that. Which, for most of us laypeople, we're like, okay, you lost us on the parts versus parts discussion. Nevertheless, it was that kind of event that led to the Clean Water Act, because it wasn't just now environmentalists. We're talking about residents.

**N. Rodgers:** Regular people are like, hey, the river's on fire. That doesn't seem like a good thing.

**J. Aughenbough:** This is not good. Now of course, constitutionally, Nia, bait question. Congress's ability to regulate the discharge of pollution into waterways in the United States flows from what constitutional power?

**N. Rodgers:** I'm going to assume that it's the Commerce Clause. Since every day when you wake up, you say to yourself, how can I bring up the Commerce Clause today? I don't sleep at your house, but I'm sure that that's what happens. I'm sure you wake up, you stretch, you get your coffee, and you think, let's see, where can I bring in the Commerce Clause today? Am I right?

**J. Aughenbough:** I don't make that kind of concentrated effort, it just flows organically. Since we're talking about rivers, water, it flows organically.

**N. Rodgers:** I'm never going to be able to set fire to your attachment to the Commerce Clause, am I?

**J. Aughenbough:** Probably not. But you are correct, Nia. The constitutional authority for the Clean Water Act was the Commerce Clause. Listeners, if you think about most bodies of water in the United States, particularly things like rivers, reservoirs, aquifers, they don't just exist in a given state.

**N. Rodgers:** Right.

**N. Rodgers:** An aquapor usually will move water from a great long distance from mountains to a city and that may or may not be in the same state as the mountain.

**J. Aughenbaugh:** Again, listeners think about in a previous podcast episode where we talked about the Supreme Court's original jurisdiction. The classic example of the Supreme Court's original jurisdiction, are disputes between states. So many of those disputes between states is about water. Water that flows, think about the Colorado River out west.

**N. Rodgers:** Exactly. I was going to say who gets to pull out a certain amount for ranches, a certain amount for cities, a certain amount that can't be pulled out because it has to continue downstream to the next state. States will sue states that are earlier in the river and say, "You took too much water and now we don't have enough." I think Florida just sued Georgia over that not too long ago. You can't live without water more than three or four days.

**J. Aughenbaugh:** The Clean Water Act is actually one of the most successful pieces of legislation in the last 50 years. Even environmentalists have acknowledged that by the time we get to 1998, basically a quarter of a century, over 60 percent of American lakes, rivers, and shoreline, were considered clean enough for swimming and fishing.

**N. Rodgers:** It's a little sad that that's not 100 percent, but 60 percent is pretty good when you consider that 25 years earlier, rivers were spontaneously bursting into flames.

**J. Aughenbaugh:** There were environmental groups who in the late 1960s were like less than 20 percent of American Water waves, are safe for fishing and swimming. This was a significant improvement.

**N. Rodgers:** Wasn't a huge amount of that about making industry stop? Because I guess with waste, before that, industry was just saying, "Oh, well, there's a river, let's just pour." Had a big pipe that goes out.

**J. Aughenbaugh:** It wasn't just industry. This is the other thing. Local governments and in some cases, state governments were just as complicit. Remember two folks, industries are regulated historically in the United States by state and local governments. It's the state police power, regulate for public health and safety. The incentives for state local governments to regulate for environmental concerns. Industries that were providing huge tax revenues, and were employing a whole bunch of their residents. Wasn't all that great. You almost had to have the federal government step in to do this, because the incentives for state and local governments to either not discharge human waste into waterways, or to regulate industries that were dumping runoff from coal mines, steel mills. As the United States began to develop its chemical goods capacity, there was a reason why the United States was known as not only the producer of plastics for the world, but the best plastics for the world. When you make plastic, you need water, and afterwards, you got a question, what do you do with all of the water that was used to make the plastic?

**N. Rodgers:** Right. Can I just have a small tiny rant for just a moment?

**J. Aughenbaugh:** Yes, go ahead.

**N. Rodgers:** People think of gross water running down the sides of the streets, and cities like London in the Dark Ages or the Middle Ages, right? They think of that as a 16 hundreds, 17 hundreds problem. That people were dumping garbage out of their window, or dumping wastewater or waste sewage as it may be, out of their windows into the streets, and the streets were gross and disgusting. Then they somehow think that it got better. The answer to that is, no, it didn't get better until somebody actively made the decision to make it better. That didn't happen until the 1970s. For most people listening, either within your lifetime or the lifetime of your parents. This is not and it's not that we didn't understand the chemicals make people sick. We've known that for a long time. We've known for a very long time, for over 400 years that wastewater can make us sick. Yet, it took until 1972 for Congress to say, "We want to make a law about that. We ought to force industry to clean up, and municipalities to clean up, so that citizens don't get cholera for no reason." Right?

**J. Aughenbaugh:** Or there will be bubonic plague or whatever [inaudible].

**N. Rodgers:** Or the rivers burst into flame, or whatever.

**J. Aughenbaugh:** Think about how many of us, or how many of you listeners like to go swimming, not in a pool.

**N. Rodgers:** But in a lake or a river?

**J. Aughenbaugh:** Or the ocean?

**N. Rodgers:** Or at the beach?

**J. Aughenbaugh:** Or, you'd like to go fishing, right? How enjoyable is it to go fishing in a river or a stream?

**N. Rodgers:** That's on fire?

**J. Aughenbaugh:** Right?

**N. Rodgers:** Really, how disgusting are the fish? That's the other thing is if people are using that because they're eating those fish, or they're eating shore birds that eat those fish?

**J. Aughenbaugh:** There's an ecological connection here.

**N. Rodgers:** What amazes me is that it is so recent. It's such a recent. "Hey, that's gross. We should probably stop doing that." But anyway.

**J. Aughenbaugh:** Part of the issue, for listeners, if you're thinking that Nia and I decided to do a podcast episode because we just like the acronym WOTUS? There's actually more to this. What we're getting at

here is as we move into the 1980s, and again, somewhat surprisingly, first the Reagan administration, then the Bush 41 administration, but it culminates with the Clinton administration. The EPA made a determination that once they had cleaned up what's known as Point Source Discharge. In other words, the discharges of pollution from big industrial sites and local governments who were offenders. The EPA then went ahead and said, "You still have a problem. We're still getting pollution from agricultural runoff, erosion from logging and construction activities." That's known within the discipline as Non-Point Source Pollution. I'm going to give you an example from the Commonwealth of Virginia. Think about farmers in Virginia, and think about, for instance, the Chesapeake Bay water swarms. When farmers go ahead and use chemicals and fertilizers to grow crops, and it rains, or they use irrigation to water their crops, where does that run off go?

**N. Rodgers:** It goes into the rivers which end up in the Chesapeake.

**J. Aughenbaugh:** Chesapeake Bay, that's right.

**N. Rodgers:** But they don't directly dump into the Chesapeake Bay most of them.

**J. Aughenbaugh:** No, most of them don't.

**N. Rodgers:** They're also not trying to dump. They're not doing what Dow Chemical did, which is just open a big gate and stuff pours out of it.

**J. Aughenbaugh:** It's right.

**N. Rodgers:** They're doing indirect. Because they're putting it on the crop and then the rain or the irrigation is washing it into either an Aquaporin that then ends up surfacing into the Bay, or into a river that surfaces into the Bay.

**J. Aughenbaugh:** Yes, and thus the name of the concept is Non-point Source Pollution.

**N. Rodgers:** The point source would be this spot. It's happening at this spot.

**J. Aughenbaugh:** This pipe is coming right from this company, and it's dumping a whole bunch of ways into this particular river. That's point-source discharge.

**N. Rodgers:** That's easier to solve.

**J. Aughenbaugh:** Yes.

**N. Rodgers:** Than it is the other stuff, is harder to solve, I would imagine.

**J. Aughenbaugh:** Part of the difficulty for the EPA was, how do you address Non-point Source Pollution, when the law says, the federal government has the authority to affect pollution in the waters of the United States?

**N. Rodgers:** Then you have to define what the waters of the United States is.

**J. Aughenbaugh:** This is where we get the controversy. You have a broad interpretation of Lotus, okay? Then the EPA can basically go into pretty much any body of water in the United States that you could plausibly make the arguments. Okay?

**N. Rodgers:** I see. Can I draw an analogy and you tell me if I'm right or wrong?

**J. Aughenbaugh:** Okay. Go ahead.

**N. Rodgers:** Technically, all land that does not have a clear deed belonging to an individual technically belongs to the United States.

**J. Aughenbaugh:** Not quite because you got to remember, the 13 original states all existed legally because of charters they had with the British crown. According to the US Constitution, once Congress ratifies a state, then that property that comprises the state belongs to who?

**N. Rodgers:** To the state.

**J. Aughenbaugh:** That's where you get this idea of dual sovereignty.

**N. Rodgers:** But it's a similar concept in the idea of, if there is not a clear responsible party for a body of water, then the responsible party would be either the state or the federal government.

**J. Aughenbaugh:** That's right. By the way, it's not just the Environmental Protection Agency, it's also the Army Corps of Engineers.

**N. Rodgers:** Which you don't want to mess with or they'll come with a levy on your property. I'm just saying.

**J. Aughenbaugh:** The Army Corps of Engineers actually has a longer history in the United States. The earliest version of the Army Corps of Engineers was with the revolutionary army led by George Washington.

**N. Rodgers:** I was going to say, didn't he have a group of engineers who built stuff for him?

**J. Aughenbaugh:** Because some of the rivers that they navigated during the Revolutionary War were not easily navigable.

**N. Rodgers:** They built bridges to get across some point. He had a group of guys who did that long before there was an EPA. EPA is '60s or '70s, I can't remember.



**J. Aughenbaugh:** No, it was '70s. Again, it was created during the Nixon administration. I apologize, listeners, if I keep on making reference to a previous podcast episodes, but Nia, you and I did a previous podcast episode, I believe, with our colleague Bill Newman, about William Ruckelshaus, who was one of those great unsung bureaucratic generalist who was brought on board by the Nixon administration to basically give leadership and guidance to the EPA. He did such a great job that they then transferred him to the Justice Department, and he ends up resigning during the Saturday Night Massacre during the Watergate crisis. Where this becomes an issue is, do you have a narrow or broad interpretation of WOTUS?

**N. Rodgers:** Let me assume that the other beloved acronym of this podcast, SCOTUS, had to decide the question of the WOTUS.

**J. Aughenbaugh:** Yes.

**N. Rodgers:** Am I correct in that?

**J. Aughenbaugh:** You are correct. SCOTUS got involved with what was the appropriate interpretation of the statutory term WOTUS. SCOTUS and WOTUS. It just sounds like a really bad dance. Anyways. That was a bad joke and I apologize to listeners. There were two cases in particular where the Supreme Court weighed in on the meaning of WOTUS. The first was from 2001. Sorry, it's just a really long case name. The Solid Waste Agency of Northern Cook County versus the United States et al.

**N. Rodgers:** By the way, the Solid Waste Agency of Northern Cook County is the SWANCC, because there are not enough acronyms in the world, SWANCC.

**J. Aughenbaugh:** Yes. I have been at academic conferences where little scientists have gone ahead and said, well, in this SWANCC case, and I'm just like, you guys are enjoying these acronyms way too much. But the court in a five to four ruling went ahead and said that the Clean Water Act does not extend to isolated waters. In other words, the EPA and the Army Corps of Engineers could not use the Clean Water Act to regulate isolated waters.

**N. Rodgers:** Does that mean, let's just pretend that Nia and Aldi decide to open a spot in the mountains, and we buy a piece of land that has a great big pond on it?

**J. Aughenbaugh:** Yes.

**N. Rodgers:** Would that pond be considered an isolated water? Is that what it means that it's not connected to other? Is that how they define isolated that it's not connected to other?

**J. Aughenbaugh:** Well, in the majority opinion written by Chief Justice Rehnquist, he said the term navigable means that Congress wanted the federal government to show that the waters are traditionally or historically been viewed as waterways in which boats, ships, people navigate the water to get from point A to point B. With your hypothetical, if this is a pond that people have not used historically or



traditionally to get from point A to point B, it is an isolated waterway and therefore cannot be regulated by the EPA or the Army Corps of Engineers.

**N. Rodgers:** But if you and I bought a property that was a huge lake and people had lived around and they had used little pontoons to get from one place to another on the way, then it could fall into that category.

**J. Aughenbaugh:** Well, what you are suggesting with your follow-up question actually occurred in practice, which is, the Supreme Court's ruling in SWANCC didn't clarify things because five short years later, the Supreme Court had yet another opportunity to define WOTUS. The court's effort was just as unsatisfying in the second case as it was the first case. The second case is the Rapanos case versus the United States. Again, what was that issue was the federal government's ability or the federal governments, if you will, authority or jurisdiction, to regulate certain isolated wetlands under the Clean Water Act. The court's ruling or the court's vote was five to four, but in reality, it was 4, 1, 4. Some of you are like, that doesn't make any sense. Five of the justices ruled against the EPA's then broad definition of WOTUS, but the five justices could not come to an agreement as to why.

**N. Rodgers:** Of course, not. We all agree they are wrong, but we're not sure why.

**J. Aughenbaugh:** Five thought the EPA and the Army Corps of Engineers was wrong but they disagreed as to why. Three of the justices joined Justice Scalia's plurality opinion.

**J. Aughenbaugh:** Where Scalia basically went in and said navigable waters means that non-navigable waters are relatively permanent standing flowing bodies of waters, and thus the federal government cannot regulate them. Basically, Scalia went ahead and focused on how historically the federal government made a distinction between navigable versus non navigable waterways. Kennedy didn't like that. Kennedy went ahead and said, the federal government had to show a significant nexus, between navigable rivers and sea to qualify under the Clean Water Act. Kennedy was willing to give the federal government more flexibility, but in this case, Kennedy said, you guys being the federal government didn't make your case. Well, not surprisingly, this led to quite a bit of confusion among the lower federal courts that hear most of these WOTUS cases. Some of the lower courts went ahead and said, Kennedy's opinion should be followed because it was his vote that created the majority. Others said, it can't be Kennedy's vote because he's only one out of five. There are more justices who signed on to Scalia's plurality opinion. Bottom line Nia as we get into the late first decade of this millennium, the federal government had some regulations about WOTUS particularly non-point sources. But it wasn't until the Obama administration in 2015 that we get the current controversy. Well, actually I would like to go back, it was 2014, but you have a question before we get to some of the recent presidential administration efforts to define WOTUS.

**N. Rodgers:** Let me make sure that I understand what's happening here. Let's say that there's a stream that runs through your property, and it ends into a lake that gets used recreationally by humans to do recreationally things, and your stream you are a farmer and you are farming wheat and you're using fertilizer and it gets into the water, and then it goes downstream and gets into the swimming lake. Your stream is not deep enough to swim in. Your stream is certainly not deep enough to hold the boat, but

the EPA wants to regulate that stream and you protest, because you say it's not within your purview to tell me what to do with this tiny little stream. Likely mitigation that you want me to do is really expensive and I can't afford it or like I want to destroy the river it's other stream, it's because what you're asking me to do is probably relatively expensive and complicated to do.

**J. Aughenbaugh:** If you're the farmer and this hypothetical Nia, because you don't want to go ahead and pay for the expensive, if you will, changes to your farming practice, you attack the EPA's source or authority in the first instance to be able to regulate your stream. Because you go ahead and argue, my stream is not a point source of pollution. It's a non-point source, and you can't necessarily demonstrate that my stream has anything to do with this lake. Now, under Kennedy's concurring opinion in the rapid this case, EPA could probably show a significant nexus between your stream and the lake. But under Scalia's plurality opinion, historically your stream is not been navigable. Therefore, does the EPA and the Army Corps of Engineers have the authority to regulate your stream?

**N. Rodgers:** The answer no, under Scalia

**J. Aughenbaugh:** That's right. Now, you get to the rob, as Shakespeare would say.

**N. Rodgers:** Now it's depending on whether the lower court justices sides with Kennedy or sides Scalia as to whether I'm going to be, and I wanted noted for the record, by the way, can we just say, very few individuals. I will not speak about industry. Normally speak about municipalities, but very few individuals want to make water filthy.

**J. Aughenbaugh:** No, I grew up with farmers.

**N. Rodgers:** They're not trying to destroy the streams and rivers and lakes upon which we all depend. That is not what they are trying to do. However, their margins are often very small, and asking them to do something mitigation wise that probably would be very expensive, could put them out of business. Like there's a reason that they're farming, it's not because they want to ruin the water. It's in part because they either want a different mitigation plan. They either want longer or less expensive, or they want not have to do that because it's going to cost them a far. I just wanted to note that from the beginning.

**J. Aughenbaugh:** Yeah, we're not beating up on farmers or loggers. I know loggers. We could go ahead and debate the merits of cutting down trees and their impact on the environment, greenhouse gases, etc. All I know is loggers are required profession, and I just want you guys to go ahead and remember when the pandemic first hit and there was a run on toilet paper at the grocery store.

**N. Rodgers:** Well, and homes, if you want homes because we don't want people to be homeless. These days, if there is at least somewhat involved in building homes. These are not people who are trying to destroy the world.

**J. Aughenbaugh:** How do we engage in these practices in a way it doesn't do damage to the environment. The EPA concluded we have to go after non-point sources.

**N. Rodgers:** To clean up the other 40 percent.

**J. Aughenbaugh:** That's right.

**N. Rodgers:** That's basically what they're trying to do now. They've got in to the big stuff, they've got in to the low-hanging fruit, they've got in to the [inaudible] to not be on fire anyone. They got the big stuff and now they're going after the 40 percent, that is non point, that is smaller people, and that is probably significantly less intentional and therefore harder to fix. If I deliberately steal something from you, I've deliberately stolen it. If I borrow something from you and forget to return it, that's a different intent. The law recognizes intent and we as humans should recognize the intent, those are two different things.

**J. Aughenbaugh:** I'm glad you went and pointed that out. Unfortunately, because of the two Supreme Court rulings, we didn't have clarity, and he get worse, and again, I'm not blaming the presidential administrations, but the last three presidential administrations, Nia have exclusively expression muddied the water even more.

**N. Rodgers:** I wonder which of us was going to do it. Thank you taking one for the team.

**J. Aughenbaugh:** Yeah. Listeners as soon as I found out that water good for waters of the United States, you knew one of us was going to go ahead and use that cliché.

**N. Rodgers:** Well done.

**J. Aughenbaugh:** Okay. I told a bad joke. I used a cliché.

**N. Rodgers:** It's a good day on my part.

**J. Aughenbaugh:** Okay.

**J. Aughenbaugh:** We still got 10 minutes left. I'm bound to go ahead and engage in a couple of other bad rhetorical writing practices here. So far, I don't think I've used any profanity, I won't run a foul of that. But nevertheless. The Obama administration in 24 announced that.

**N. Rodgers:** In 2014.

**J. Aughenbaugh:** Yeah, 2014. I'm already jumping ahead. Yes. They were going to propose a new rule regarding WOTUS. If you will, expand the definition of non-point source pollution. Well, in June of 2015, they published the final rule and almost immediately states and businesses went to federal court and had federal courts issue injunctions stopping the implementation of the new rule. Now, I want you to take note Nia, that was 2015. That was the year before the 2016 presidential election.

**N. Rodgers:** Yes.

**J. Aughenbaugh:** We get a new President, Donald Trump. Not a particularly big fan of environmental regulations.

**N. Rodgers:** Or any regulation really. I mean, don't limit him. He doesn't care for regulations generally.

**J. Aughenbaugh:** In January of 2017, the month Trump takes office. The Supreme Court says they're going to take one of these cases where the Obama administration's new WOTUS rule was being challenged.

**N. Rodgers:** Now this is two years later. Because that's how long it takes through the court system for things to do in the United States. Two years later they say, "You know what? Fine. We'll hear a case and try to settle this."

**J. Aughenbaugh:** Yeah. If nothing else, could the court perhaps clarify its precedence about whether or not the EPA and the Army Corps of Engineers had the authority to expand WOTUS, right?

**N. Rodgers:** To extend the definition.

**J. Aughenbaugh:** We should. One month later, the Trump administration announces per the Administrative Procedures Act that it was going to Administrative Procedures Act.

**N. Rodgers:** Is that what to do if you do the right to do Executive Order?

**J. Aughenbaugh:** No. But he announces an executive order saying that we're going to follow the Administrative Procedures Act. I'm giving notice that we are going to pull the Obama administration's definition of WOTUS and perhaps come up with a new definition. But mind you listeners while all this is going on, as far as the EPA and the Army Corps of Engineers is concerned, they only have the authority to implement a definition of WOTUS that existed before 2015 because that's the only one that's not been stayed by a federal court.

**N. Rodgers:** I was going to say because the others have injunctions against them from the immediate no, we're going to fight this in court.

**J. Aughenbaugh:** That's right.

**N. Rodgers:** Now. Back to the pre 2015 definition.

**J. Aughenbaugh:** Yes.

**N. Rodgers:** Back to the Kennedy Scalia question mark.

**J. Aughenbaugh:** That's right. Things aren't completely muddied, cloudy. There's fog we can't see anything in regards to what is the acceptable definition of WOTUS. June of 2017, the Trump

administration publishes a proposed rule to repeal WOTUS, and they're going to come up with new regulations. 2018, the Supreme Court says courts of appeal.

**N. Rodgers:** All right cause there still that court case out at the edge?

**J. Aughenbaugh:** That's right and the Supreme Court one year later, issues are rolling that goes ahead and says the district court should actually have a trial to determine whether or not the EPA and the Army Corps of Engineers had the authority to come up with an expanded definition of WOTUS, of course, the Trump administration.

**N. Rodgers:** Wait, so they've ruled that there should be in a court case?

**J. Aughenbaugh:** Trump is already revising the rule that's at issue in the court case. Yes.

**N. Rodgers:** You all should get together and have a court case about this, except that now there's not even a thing to have a court case about because we've moved on.

**J. Aughenbaugh:** Yes.

**N. Rodgers:** Not working in tandem, but working tangentially.

**J. Aughenbaugh:** Listeners, as you may recall, Nia and I did a podcast episode about rules for the regulators. For the rule makers. I went ahead and mention it typically takes 18-24 months for a regulation to go from a proposed rule to a final rule or regulation adopted by an agency.

**N. Rodgers:** Right. Because there has to be common periods.

**J. Aughenbaugh:** Yes right.

**N. Rodgers:** There's change and then there's a common period and then there's a change. It's really actually the best thing about democracy.

**J. Aughenbaugh:** Yes.

**N. Rodgers:** We're going to make a rule and you tell us what's wrong with it and you tell us where it won't fit in, how it won't work?

**J. Aughenbaugh:** In October of 2019.

**N. Rodgers:** Wait.

**J. Aughenbaugh:** It took two years. October of 2019, the EPA and the Army Corps of Engineers published a final rule that officially repealed the Obama administration's 2015 voters rule and restored the quote,

1986 regulatory definition of waters of the United States emphasizing the Supreme Court's rulings and Swank and rapid notes.

**N. Rodgers:** They went backwards some 20 years?

**J. Aughenbaugh:** Yes. Gets even better. It gets even better. In 2020, Trump's last three weeks in office. The new rule, which is basically the old rule gets challenged in federal court. Then junction is issued, stopping it from being implemented. I'm not done. Because who gets elected and takes office in January of 2021.

**N. Rodgers:** Biden.

**J. Aughenbaugh:** Biden, and after ten months of review. In November of 2021, the EPA and the Army Corps of Engineers now has proposed a third definition of WOTUS in the past six years. It is different than the Obama and Trump definitions. The Biden administration, according to many scholars, including, by the way, Jonathan Adler from Case Western law school, he's an excellent, by the way, environmental legal scholar. It's a more modest, conservative approach. It actually references both the Supreme Court rulings in Swank and Rapinoe. Almost every piece of commentary I read he has said, "Is that as ambitious as environmentalists would like? No. Is it less likely to be overturned, in particular by the US Supreme Court? Yes."

**N. Rodgers:** Can I just throw out there. What I'm coming to understand more and more about Biden's administration is that Biden in many ways is truly a moderate in the sense that he's trying to get incremental change.

**J. Aughenbaugh:** Sure.

**N. Rodgers:** Because when you do big change, the first thing that happens is that you get an injunction because people will say, heck to the no, that's too big a change. I'm not going there, you can't make me. But if you go little change by little change, then you can get people to say, okay, this is less painful because it's not this all at once big dramatic thing.

**J. Aughenbaugh:** Well, Nia, you've heard me say off recording. That I am amused body how both Progressives and Conservatives are critical of the Biden administration's legislative proposals, but for different reasons. Because the Conservatives go ahead and argue that he's one click away from being our first socialist president of the United States, right?

**N. Rodgers:** Right. He's so moderate and conservative he might as well, not even call himself a Democrat [inaudible]

**J. Aughenbaugh:** Well, yeah. Very critical and you just use this word a few moments ago of how incremental his legislative proposals actually are. Because in part, Biden, the old US senator is willing to negotiate the substance of legislation that he would like Congress to pass.

**N. Rodgers:** I think he thinks that incrementalism is the only way he's going to get past the huge divide that we have right now in congressional politics. It's the only way he's going to get people to get on board is to not do things that are giant in one direction or another. Because yes, the Conservatives who think he is socialist. They say that publicly, but privately, a lot of them are like, yeah, I could live with that.

**J. Aughenbaugh:** Yeah, they may not necessarily like the bill, but at the same time they're like, what he's asking for is or could have been far worse or more expensive or more intrusive. Progressives are like, well, it doesn't go nearly far enough. Well, is your goal to go ahead and get legislation passed or is your goal to go ahead and achieve everything that you want? Because at some point in time, if you were a member of Congress, you got to run for reelection. If you're Joe Biden, and this is your first year of your first term and you're thinking about running for re-election in 2024, you got to get some stuff passed, right?

**N. Rodgers:** Right.

**J. Aughenbaugh:** You got to go ahead and show the voters you did something, right?

**N. Rodgers:** Right.

**J. Aughenbaugh:** I teach the courts. You've heard me say this before. If you want to go ahead and get the federal courts to sign off on what you are doing administratively, going for a broad, new sweeping interpretation of a statutory term is not going to work. Particularly with a Supreme Court that is populated by six justices appointed by President, and at least four of them have been openly skeptical, either in previous court cases or in testimony in front of the Senate Judiciary Committee of administrative agencies having broad delegated authorities, and then deciding to make it even broader with how they interpret statutory terms.

**N. Rodgers:** At least four of our justices believe that that's a power grab.

**J. Aughenbaugh:** Sure.

**N. Rodgers:** They've made it clear that they believe that that's a power grab.

**J. Aughenbaugh:** That it's unconstitutional, that it violates checks and balances, blah, blah, blah, blah, blah.

**N. Rodgers:** I may be wrong because I don't know obviously, and you'll correct me because I'm not a scholar of the courts in general. But it seems to me that most justices, in fact, almost all justices are conservative, little c.

**J. Aughenbaugh:** Yeah.



**N. Rodgers:** They are conservative in the sense that they don't believe that there should be giant shifts in the law ever. That the law should shift as cultural understanding, shifts as the people. There's very few times when we have a giant shift in how we live our lives culturally. We saw that after 9/11 and we saw the courts take that up. They took a pretty big shift on what they consider to be terrorism and those kinds of things and what you could do with terrorists. But generally speaking, they don't rebut way ahead of where the culture is and where the people are.

**J. Aughenbaugh:** People are, yeah.

**N. Rodgers:** I think that tends to be all justices, I think they tend to be a conservative group in general because I think that the law is generally conservative in that way. It changes incrementally.

**J. Aughenbaugh:** Yeah, there's the old adage among lawyers and legal scholars. The law should be consistent, but able to be changed. That's one of the fundamental tensions that you see on, for instance, the Supreme Court, even with the Civil Rights rulings of the Warren Court. It was followed by the Burger Court, which did not wildly go back in the opposite direction. You mentioned, for instance, the Supreme Court post 9/11. Did the court rein in the political branches in a number of cases? Yes. But did they say the political branches could not conduct a global war on terrorism without a declaration of war? Yes. I always caution my students about this. You have to take a look at these institutions over a broader period of time than just one year, three years, five years, etc. Think about the statutory term and I'm going to bring it back to the subject of this podcast. Look at the statutory term, waters. Waters of the United States is in the statutory text of the Clean Water Act. But over time, you have agencies interacting with courts, courts issuing rulings. Does Congress respond? Does a presidential administration respond? All of that takes time, right?

**N. Rodgers:** Right.

**J. Aughenbaugh:** It takes time. I understand, if you are an environmentalist and you're concerned about the environment, you're concerned about clean water.

**N. Rodgers:** Yeah, we have to fix it tomorrow. But that's not how government works.

**J. Aughenbaugh:** Nia, you're fond of using the metaphor that the federal government is like a large ship.

**N. Rodgers:** Yes.

**J. Aughenbaugh:** You have said it a number of times on this podcast.

**N. Rodgers:** Yeah, it's in the battleground, it's a carrier, it's huge.

**J. Aughenbaugh:** Those large ships are not easily turned around.

**N. Rodgers:** No.

**J. Aughenbaugh:** Heck, even get them to move 20 degrees to the left or 20 degrees to the right requires a lot of people coming together and saying, yeah, we should avoid that iceberg. Is it 15 degrees? Is it 20? Is it 25 degrees? How far should we go?

**N. Rodgers:** There's only so much we can do before we capsize the entire thing. The metaphor holds all the way through.

**N. Rodgers:** It took us as a country 250 years to decide that we didn't like filthy water, and we've only been added for the last 40 years trying to decide who cleans it up, how they cleaned it up, under what circumstances, who regulates it, who has the authority? It shouldn't surprise us as a country that it's going to take us a while to figure it out. Do I think it needs to be figured out? Of course it does. I'm on environmental side of yes, we should be doing this actively and it should be worked on actively? Yes. But I also recognize that because nothing in the government moves that fast, you just have to accept that there needs to be common periods, there needs to be lengthy discussions. People need to feel like they have buy-in.

**J. Aughenbaugh:** That they have voice.

**N. Rodgers:** Otherwise we don't have democracy. Should we have an environmental dictatorship? Well, it would certainly be interesting.

**J. Aughenbaugh:** Again, you know that's the rub of democracy, right?

**N. Rodgers:** Right.

**J. Aughenbaugh:** You want people to have a voice, because if they don't have a voice, they're less likely to go ahead and think that the system is paying attention to them, which means they're less likely to accept the decision, which means they are more likely to go to court, to stop the government from doing X.

**N. Rodgers:** Or form a revolution.

**J. Aughenbaugh:** Yes.

**N. Rodgers:** Don't think that that can't happen here. It's already happened here once, and then there was a second attempt. The thought that the United States is somehow immune from enough grumpy people deciding to have a revolution, no, it's not. This case were big, it doesn't mean we can't have one. It has happened pretty regularly. Other countries have that a lot. We're lucky that we had been a stable as long as we have.

**J. Aughenbaugh:** Listeners, I apologize if I'm repeating myself, but even if giving people a voice ends up being symbolic, with rulemaking, a whole bunch of us can go ahead and say, we hate this particular proposed regulation, and the agency could go ahead and say, "Hey, thanks for your informed comments, but we're still going to go in this direction."

**N. Rodgers:** Well, is it Dr. Drake says, "Thanks for sharing."

**J. Aughenbaugh:** Yeah. Right. Thank you for sharing.

**N. Rodgers:** Leaving on.

**J. Aughenbaugh:** Which is what she usually says to me when I ask her ad nauseum in an aim question about public health, she's just like, "Okay, thank you for sharing Aughe," and I'm like, "Yeah, that was pretty much a stupid question," but at least she listened to me. A lot of times that's what the affected parties want.

**N. Rodgers:** Right.

**J. Aughenbaugh:** Did somebody listen?

**N. Rodgers:** Well, and somebody acknowledged that they're being affected. With eminent domain and I never going to get off topic so I'm not going to go very far. If the Corps of Engineers came and did something to a stream on your property because of eminent domain and they paid you for it, you being able to say, "Hey, that's not fair," is something that someone somewhere should listen to even if they can't stop the overall thing that has to have it. Because it's not fair and it's not nice and you are being put upon.

**J. Aughenbaugh:** Yeah, you're being affected.

**N. Rodgers:** Somebody should say, "Hey, ma'am, I'm sorry, that that's happening to you." When bad things happen to other people and we say, "I'm sorry," we're not saying I'm sorry because I feel guilty. Were saying, I'm sorry that a bad thing is happening to you, and I feel sympathy and empathy for you and I wish it didn't have to happen or it wasn't happening this way. But anyway, to get back to our final word of thing, will we see a new regulation? Will we see that completed, do we think in the next year or two?

**J. Aughenbaugh:** I think for listeners who are interested, what the Biden administration did in November of 2021 was the proposed rule. Now it has to go through notice and comment. I suspect at some point in 2022 in the Federal register, they will make a public announcement that this is the final rule. Again, because it deals with WOTUS, somebody will sue. If it doesn't go far enough, some environmental group will sue.

**N. Rodgers:** If it goes what people believed to be too far then they'll sue.

**J. Aughenbaugh:** Yeah.

**N. Rodgers:** Somebody is going to sue because its the United States and there's going to be an injunction.

**J. Aughenbaugh:** Yes. We are a litigious society but I really do think that the Biden Administration Lotus definition stands a better chance with the federal courts.

**N. Rodgers:** Okay. I've taken home.

**J. Aughenbaugh:** If it gets to the United States Supreme Court, I actually think because the proposed rule talks about how it's complying with both the Swank and rapid Lotus rulings that you're going to get even justices who may not like the substance of the rule, say, yeah this makes sense. This is the EPA and the Army Corps of Engineers trying to comply with our convoluted rulings in our previous cases. Though, I could see, for instance, Briar, Robert, Kagan, all saying, yeah, this is fine. Heck for that matter, I could easily see Kevin, Coney Barrett. Maybe even so to my door. Yeah, go ahead.

**N. Rodgers:** Sorry. It would be interesting to see what Gorsuch says considering he's from the West, where water is God. Like water is everything.

**J. Aughenbaugh:** For somebody like Gorsuch this is the type of case that could prove to be very difficult for him because Donald Wanland, he's one of the sternest critics of the federal courts deferring to the bureaucracy because he thinks it violates checks and balances. On the other hand, as you pointed out, he's from Colorado. Water or hay is a precious commodity for folks from the west, and any effort by the Federal government to keep it clean, to protect its quality, has to resonate with a Justice Gorsuch, right?

**N. Rodgers:** Right. We'll come back and follow along in a couple of years when we'll say, "Okay, when we last left to you," and then we'll catch you up on all the stuff that happens in the next couple of years.

**J. Aughenbaugh:** We'll continue the story of Wotus.

**N. Rodgers:** Thanks Aughe.

**J. Aughenbaugh:** Thank you.

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