

# Regulatory and Litigation Update

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North American Meat Institute  
Environment, Labor and Safety Conference  
April 16, 2024



# Overview

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- WOTUS post-SCOTUS (Sackett)
- PFAS Regulatory Update
- EPA Enforcement Priorities
- Citizen Science Update: MethaneSAT
- Other Developments to Track in 2023

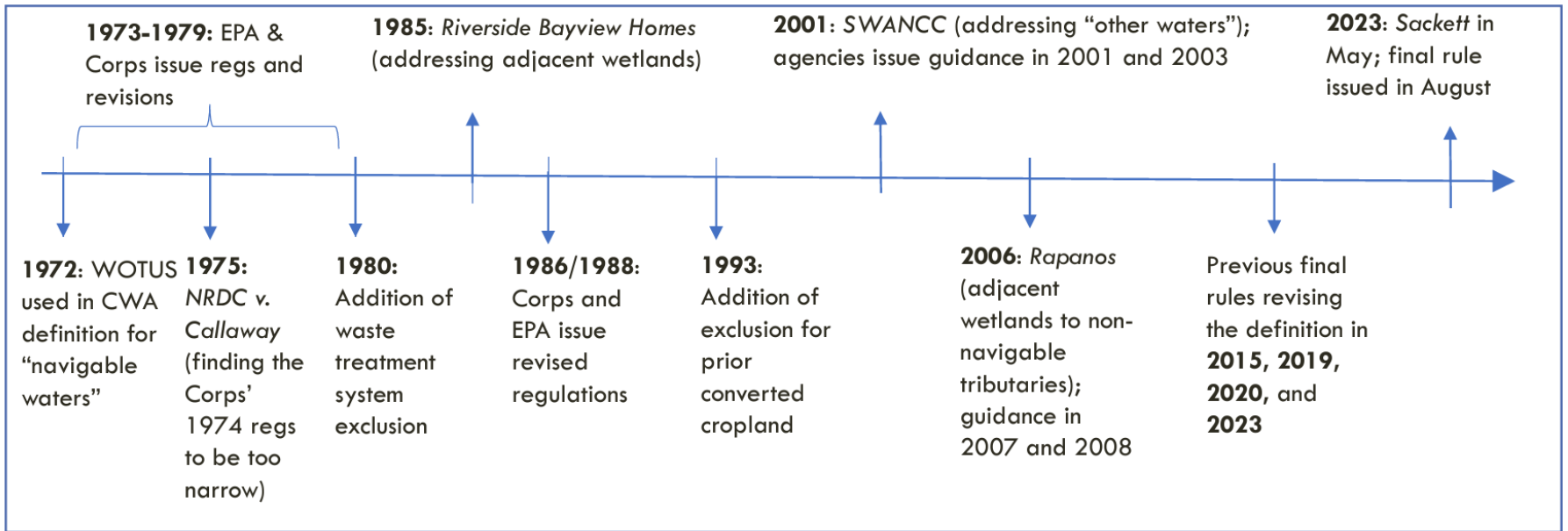
# WOTUS post-SCOTUS (Sackett)

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# “Waters of the United States” Over Time

The definition of “waters of the United States” has been a subject of dispute and addressed in several major Supreme Court cases.



Source: EPA

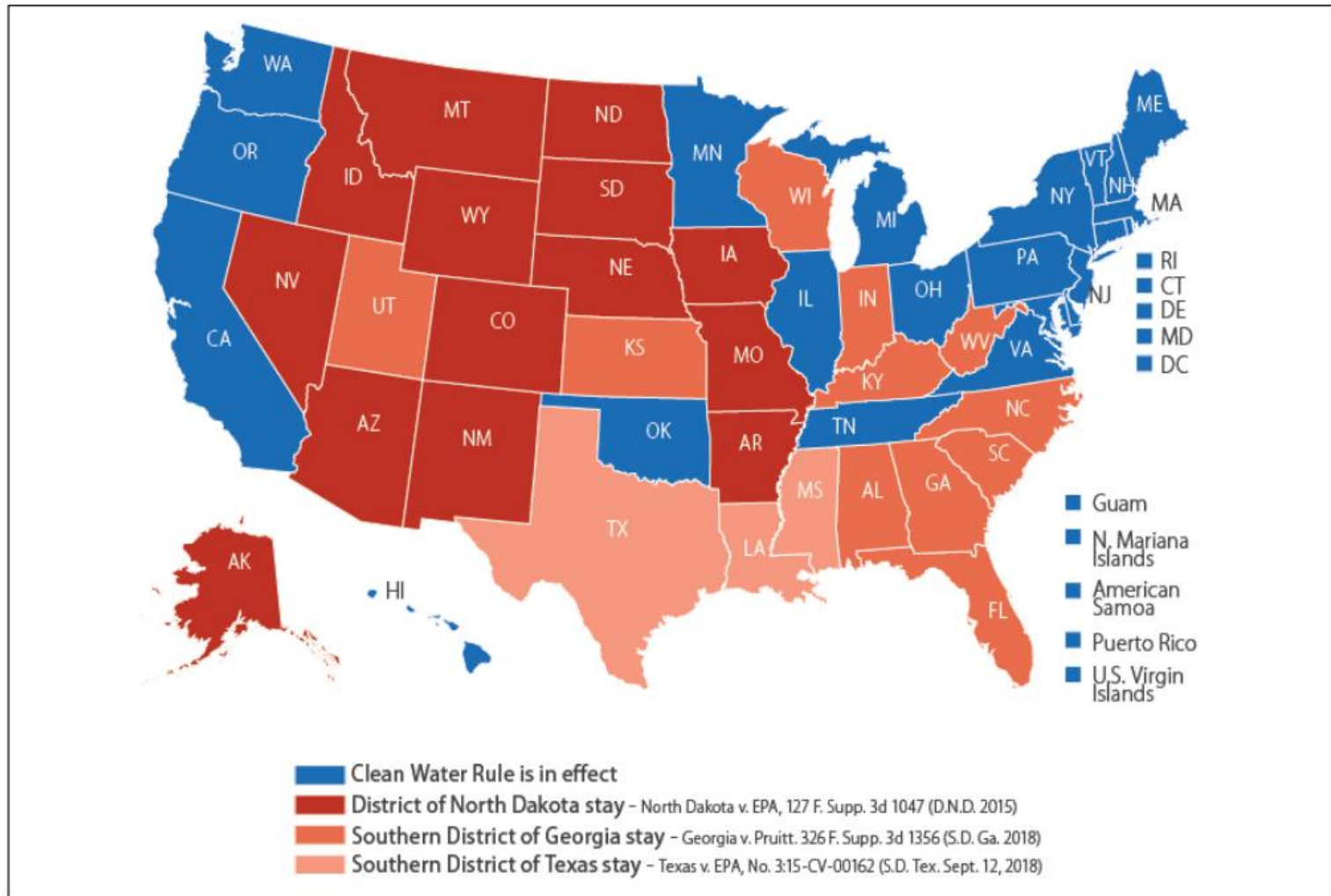
# January 2023 Biden Final Rule

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## Regulated waters....

- Traditional navigable waters, interstate waters, and the territorial seas, and their adjacent wetlands;
- Most impoundments of “waters of the United States;”
- Tributaries to traditional navigable waters, interstate waters, the territorial seas, and impoundments that meet either the **relatively permanent** standard or the **significant nexus** standard; and
- Wetlands adjacent to impoundments and tributaries and “other waters,” that meet either the **relatively permanent** standard or the **significant nexus** standard.

# Clean Water Act Jurisdiction - 2019



Source: Congressional Research Service

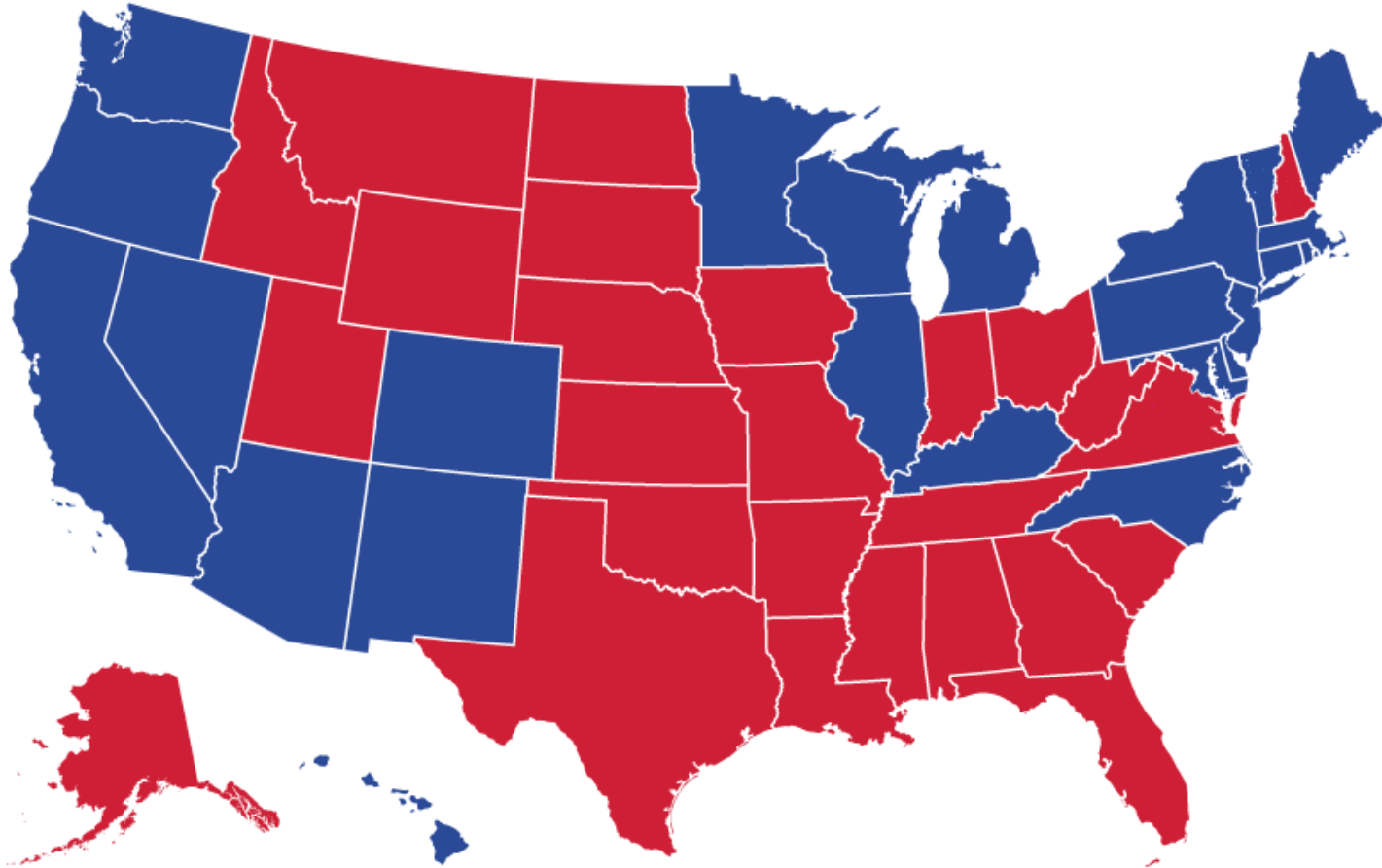
# Clean Water Act Jurisdiction - 2022

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# Clean Water Act Jurisdiction – May 2023 (pre-Sackett)

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Source: Politicopro.com





# ***Sackett v. EPA***

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Source: Pacific Legal Foundation

# Sackett v. EPA

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- What is the correct test for determining whether a wetland is among the "waters of the United States" and thus subject to regulation under the Clean Water Act?
  - Petitioners' two-step test: (1) is the wetland inseparably bound up with a "water," making it difficult to discern the boundary; (2) is that "water" among the waters that Congress can regulate under the Commerce Clause?
  - EPA's test: are the wetlands adjacent to covered waters, and do they have a "significant nexus" to those waters, even if they are physically separated from them?



**NOT NAVIGABLE WATER**

**SACKETT  
PROPERTY**

**KALISPELL BAY ROAD  
(30 ft paved road)**

**OLD SCHNEIDER ROAD**

**NAVIGABLE WATER**

**Majority**



**Concurring**



**Concurring in part and concurring in the judgment**



**Concurring in the judgment**





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## *Sackett v. EPA*

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**Holding:** The Clean Water Act extends only to wetlands that are as a practical matter indistinguishable from waters of the United States, which requires a showing that:

1. An adjacent body of water is a “relatively permanent body of water **connected to traditional interstate navigable waters**” and
2. The wetland has a continuous surface connection with that water, making it “**difficult to determine where the ‘water’ ends and the ‘wetland’ begins**”



## HOW TO SELECT AN IMAGE BACKGROUND:

Right click here.

Select **Format Background**.

Under the format tab, select **Picture or texture fill**.

Click **Insert or File**.

Select **From a File** or navigate to the location of the image in your file browser, then you would like to use.

Select the file and then click **Insert**.

# Will wetlands ever qualify?

Yes, but only if they are not separate from traditional navigable waters. Being nearby is not enough unless they're connected with "no clear demarcation."



## *Sackett v. EPA*

### What qualifies as “waters of the United States”?

#### QUALIFIES

- ✓ Oceans
- ✓ Lakes
- ✓ Rivers
- ✓ Streams
- ✓ Some Wetlands  
(But only if connected to traditional navigable waters)

#### DOES NOT QUALIFY

- ✗ Puddles
- ✗ Isolated Ponds
- ✗ Many Wetlands  
(Unless connected)

# EPA and Army Corp. Conforming Rule

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- The agencies determined there is “good cause” under section 553(b)(B) of the Administrative Procedure Act to issue a final rule without prior proposal and opportunity for comment because such notice and opportunity for comment is unnecessary.
- Certain provisions of the 2023 Rule were deemed invalid under the Supreme Court’s interpretation of the Clean Water Act in the *Sackett* decision.
- Providing advance public notice and seeking comment was unnecessary because the sole purpose of this rule is to amend these specific provisions of the 2023 Rule to conform with *Sackett*, and such conforming amendments do not involve the exercise of the agencies’ discretion.



# Targeted Changes to January 2023 Rule

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## Categories of Jurisdictional Waters

(a)(1)

- (i) Traditional Navigable Waters
- (ii) Territorial Seas
- (iii) Interstate Waters – **revised**

(a)(2) Impoundments of Jurisdictional Waters

(a)(3) Tributaries – **revised**

(a)(4) Adjacent Wetlands – **revised**

(a)(5) Additional Waters – **revised**

Source: EPA

# Targeted Changes to January 2023 Rule

**(a)(1)(iii) interstate waters revised to remove interstate wetlands →**

(1) Waters which are:

(i) Currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) The territorial seas; or

(iii) Interstate waters, ~~including interstate wetlands~~;

**(a)(3) tributaries revised to delete significant nexus standard →**

(3) Tributaries of waters identified in paragraph (a)(1) or (2) of this section:

~~(i) That are relatively permanent, standing or continuously flowing bodies of water; or~~

~~(ii) That either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section;~~

**(a)(4) adjacent wetlands revised to delete significant nexus standard →**

(4) Wetlands adjacent to the following waters:

(i) Waters identified in paragraph (a)(1) of this section; or

(ii) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3)(i) of this section and with a continuous surface connection to those waters; ~~or~~

~~(iii) Waters identified in paragraph (a)(2) or (3) of this section when the wetlands either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section~~

Source: EPA

# Targeted Changes to January 2023 Rule

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↳

**(a)(5) additional waters revised to delete significant nexus standard and delete streams and wetlands →**

(5) Intrastate lakes and ponds, ~~streams, or wetlands~~ not identified in paragraphs (a)(1) through (4) of this section:

~~(i) That are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3)(i) of this section; or~~

~~(ii) That either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section.~~

Source: EPA

# WOTUS Definition

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- Are we finally done?
- What does adjacent mean?
  - Wetlands
  - Ephemeral or other intermittent streams.
- State clean water regulation



# PFAS Regulatory Update

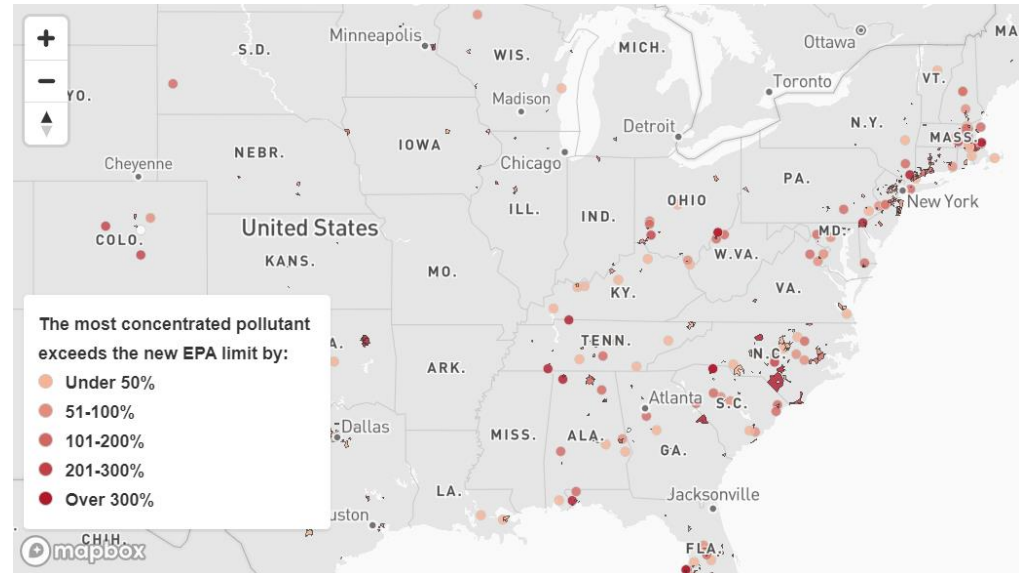
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# PFAS Regulatory Update – Drinking Water

- April 10, 2024: EPA announces drinking water standard.
  - EPA considered 120,000 comments.
  - MCLs for 5 PFAS; 4 ppt for PFOA and PFOS.
  - \$21 billion available to help public water systems and private well owners address PFAS.
  - Industry has more time to comply (3 years).

Compound	Final MCLG	Final MCL (enforceable levels)
PFOA	Zero	4.0 parts per trillion (ppt) (also expressed as ng/L)
PFOS	Zero	4.0 ppt
PFHxS	10 ppt	10 ppt
PFNA	10 ppt	10 ppt
HFPO-DA (commonly known as GenX Chemicals)	10 ppt	10 ppt
Mixtures containing two or more of PFHxS, PFNA, HFPO-DA, and PFBS	1 (unitless) Hazard Index	1 (unitless) Hazard Index



# PFAS Regulatory Update – CERCLA Hazardous Substances

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- April 19, 2024 (???): EPA may announce CERCLA final rule for PFOA and PFOS
  - Would designate PFOA and PFOS as hazardous substances under CERCLA.
  - Will require reporting releases of PFOS or PFOA that meet or exceed reportable quantity.
  - Exposure to Superfund liability - CERCLA establishes liability for owners, operators, arrangers, and transporters.
  - Impacts on disposal methods and costs.
  - As proposed, the rule does not include exclusions from liability for water utilities and wastewater treatment plants, or farms with applied biosolids.
  - Has cleared OMB review.

# State PFAS Regulations

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- **Colorado's** Perfluoroalkyl and Polyfluoroalkyl Chemicals Consumer Protection Act bars the sale or distribution in Colorado of any product containing “intentionally added PFAS,” including carpets or rugs, fabric treatments, food packaging, etc.
- **Maryland's** prohibitions on intentionally added PFAS in rugs or carpets, firefighting foam, and food packaging became effective on January 1, 2024.
- **Rhode Island, Minnesota** and **Connecticut** all have new prohibitions on intentionally added PFAS in food packaging.
- **Minnesota** and **Maine** are figuring out PFAS reporting rules.



# EPA Enforcement Priorities

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# EPA's 2024-2027 National Enforcement and Compliance Initiatives

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- Six priority areas:
  - Mitigating Climate Change (new)
  - Addressing Exposure to PFAS (new)
  - Protecting Communities from Coal Ash Contamination (new)
  - Reducing Air Toxics in Overburdened Communities (modified)
  - Increasing Compliance with Drinking Water Standards (continued)
  - Chemical Accident Risk Reduction (continued)

# NECI Downgrades

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- Returned to Core Program:
- Reducing Toxic Air Emissions from Hazardous Waste Facilities
- Stopping Aftermarket Defeat Devices for Vehicles and Engines
- Reducing Significant Noncompliance with NPDES

# MethaneSAT and GHG Regulation

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Tuesday, April 16, 2024

# FARMERSWEEKLY

HOME NEWS MARKETS POLITICS TECHNOLOGY PEOPLE OF

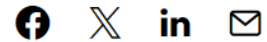
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## TECHNOLOGY

# MethaneSAT to monitor cow gas from space



Neal Wallace  
March 14, 2024



A few times a month satellite will pass over NZ and monitor emission trends from at least two of its main dairy areas.

# Citizen Science Update

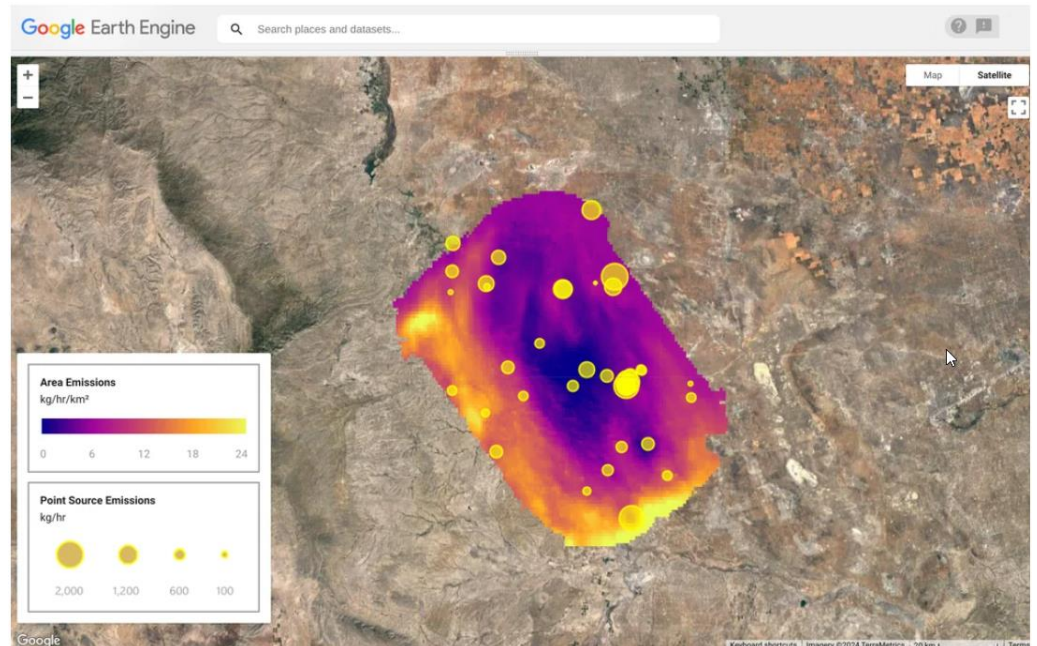
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- MethaneSAT was primarily designed to monitor methane leaks from the fossil fuel industry.
- Launched in March on a SpaceX Falcon 9.
- Orbits Earth 15x per day at altitude of 350 miles.
- In New Zealand, it is being used to measure methane emissions from livestock (dairy).
- Satellite will measure methane levels between the ground and the top of the atmosphere.
- Can detect methane at 2 ppb when averaged over a 1km spatial resolution.



# MethaneSAT

- Data will be available online and accessible via Google Earth.
- Can add to other data sets, see impacts over time, integrate AI learning models.



# Other Items to Track in 2024

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# Other Items to Track in 2024

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- Future of Chevron deference
  - *Loper Bright Enterprises v. Raimondo* – oral arguments in January.
  - National Marine Fisheries Service rule that requires the herring industry to bear the costs of observers on fishing boats.
  - Chevron’s key holding: courts should defer to an agency’s reasonable interpretation of an ambiguous statute.
  - Majority of court seems ready to get rid of Chevron deference.
- Oklahoma NRD litigation
  - Blast from the past



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# Comments and Questions?

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