

TUWaterWays

Water News and More from the Tulane Institute on Water Resources Law & Policy
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Wondering Whether WOTUS Applies? Well, Where Do You Live?

Last week, a federal judge in South Carolina issued a nationwide injunction regarding the Trump administration's suspension of the Obama-era [Clean Water Rule](#), also known as the Waters of the United States ("WOTUS") Rule. The Rule was issued under the authority of the Clean Water Act and clarified which waters qualify under the law as "waters of the United States." In doing so, the Rule extended existing federal protection of large bodies of water to hydrologically and ecologically connected smaller bodies of water, such as streams and wetlands. Opponents of the Rule, including farmers, ranchers, and real estate developers, complained that it infringed on their property rights (never mind that agriculture is largely exempt from the rule in the first place). Earlier this year, upon the verge of the Rule's implementation, the Trump administration suspended the Rule and announced plans to issue its own version.

In his [ruling](#), Judge David Norton concluded that, in suspending the Rule, the EPA and the Army Corps of Engineers had not adhered to the Administrative Procedure Act because they "refused to engage in a substantive reevaluation of the definition of the 'waters of the United States' even though the legal effect of the Suspension Rule is that the definition of 'waters of the United States' ceases to be the definition under the WOTUS rule and reverts to the definition under the 1980s regulation." Judge Norton's ruling reinstates WOTUS in [twenty-six states](#), including Louisiana, but it will not impact the twenty-four other states where legal challenges are still pending. [Considering the unlikelihood of legislative agreement](#), the fate of the Rule will likely remain in the hands of the federal courts. For now, our waters are, as Honest Abe said, a [house divided](#). This WOTUS saga is so long and convoluted, that it would come as no surprise if the next chapter calls for [vampire hunting](#).

Surface Moon Water Confirmed for the First Time

[Looking out on the morning rain](#), we feel so inspired to learn that the [respected](#) folks at NASA have definitively [confirmed that there is water on the surface of the moon](#). It is not in the form of a [moon river](#) in which we'll be [rolling in the deep](#) or for which we'll have to build a [bridge over troubled water](#); rather, the water is found in ice deposits, which are concentrated in lunar craters at the southern pole and more widely, though sparsely, spread at the northern pole. Due to the small tilt of the moon's rotation axis, sunlight does not reach these areas. The findings can be read [here](#). We'd be a [chain of fools](#) if we didn't take this opportunity to [think](#) about which of our earthly water law doctrines might apply to this surface moon water someday. [Prior appropriation](#)? [Riparianism](#)? Or a [hybrid](#)? In the meantime, we will

The **Tulane Institute on Water Resources Law and Policy** is a program of the Tulane University Law School.

The Institute is dedicated to fostering a greater appreciation and understanding of the vital role that water plays in our society and of the importance of the legal and policy framework that shapes the uses and stewardship of water.

Coming up:

[World Water Week](#)

August 26-31, 2018

Stockholm, Sweden

Water jobs:

[Program Manager for Watershed Outreach](#)

Pennsylvania Environmental Council
Pittsburgh, PA

[Policy Analyst](#)

Grantham Research Institute on Climate Change and the Environment
London, UK

[Director of Development and Membership](#)

Coalition to Restore Coastal Louisiana
New Orleans, LA

[Director of Finance and Administration](#)

Coalition to Restore Coastal Louisiana
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[say a little prayer](#) for some [amazing grace](#) to shed light on more discoveries, e.g., learning about the moon ice, how it got there, and how it interacts with the overall lunar environment.

“It’s the Economy, Stupid!”

The Army Corps of Engineers has endorsed [a plan to deepen the lower Mississippi River](#) by five feet in order to accommodate larger ships. In approving the plan, the Corps cited economic and ecological benefits, estimating a nearly \$110 million economic net benefit from the project and concluding that nearly 1,460 acres of new marsh habitat can be created with the dredged material. The project would benefit the Port of New Orleans; the Port of Greater Baton Rouge; the Plaquemines Port, Harbor and Terminal District; and the Port of South Louisiana. Trade experts indicate that, trade war aside, the project could increase imports of crude oil, iron, and gasoline, as well as exports of corn, soybeans, and coal. The Corps has considered the project for years in light of the [increasing size of cargo ships](#) and the [2016 expansion of the Panama Canal](#). The projected cost of the project is \$238 million, with the Corps recommending that the federal government contribute nearly half the cost and the State Department of Transportation and Development assuming the rest. All that awaits is congressional approval of the funding. So it’s as good as done, right?

Not-So-Lucky Las Vegas

After receiving orders from a state judge to hold do-over hearings, Nevada’s top water official, State Engineer Jason King, has rejected a plan for Las Vegas to pump and pipe drinking water from arid valleys just west of the Utah state line, despite having thrice approved such applications since 2007. The judge had ordered Mr. King to recalculate if there truly is ample underground water to supply the 250-mile pipeline with enough water to serve more than 165,000 homes. Currently, [Lake Mead](#) supplies 90 percent of Las Vegas drinking water, but some have argued that the pump and pipe project might become essential [if drought continues to shrink Lake Mead](#).

Opponents of the project argue that the sparsely populated areas of Spring, Cave, Dry Lake, and Delamar valleys would be reduced to dust bowls. Mr. King complained that he was in a tough position and that the court order required him to “upend the historical application of [Nevada water law and water rights](#).” However, in his ruling, Mr. King admitted that the plan threatens an unusually lush area of meadows and swamp cedar plants in Spring Valley, which has been designated a “critical environmental concern.” Mr. King and the applicant, Las Vegas-based Southern Nevada Water Authority, have both expressed their intent to appeal the judge’s order.

At the very least, everyone can agree that “The Pump and Pipe Project” is a pretty good band name for a pretty terrible band.

EPA Reportedly Curbing Its Own Power. Yes, You Read that Correctly.

Though the Army Corps of Engineers is the permitting agency for dredging and filling in waterways and wetlands under the Clean Water Act, [Section 404\(c\)](#) of the law grants the EPA the ability to restrict or veto permits. That power has been used [13 times](#) since 1972 when the law was enacted. However, abiding by a June [memo](#) from former Administrator Scott Pruitt, the EPA is reportedly moving forward with a regulation that will limit the agency’s ability to veto water pollution permits before applications are filed with the Corps or after a permit has been issued (i.e., pre-emptive and retroactive vetoes). The action is considered to be a response to conservative outrage over the Obama administration’s use and proposed use of the veto authority in two instances. In the case of the [Spruce coal mine in West Virginia](#), the EPA veto came years after a Corps permit was issued; and, in the case of the [Pebble Mine in Alaska](#), the EPA proposed blocking the project due to concerns over [Bristol Bay](#) before a mining proposal had even been submitted to the Corps. The EPA is reportedly planning to send a draft regulation to the White House for review by the end of December.