

TUWaterWays

Water News and More from the Tulane Institute on Water Resources Law & Policy

[September 26, 2019](#)

All Roads Lead to WOTUS

Have you, like us, been worryingly wondering how the Supreme Court would resolve the scope of the Clean Water Act in the highly anticipated case of [County of Maui v. Hawai'i Wildlife Fund](#)? If so, worry no more because the Maui County Council voted 5-4 on September 20 to approve a resolution supporting a settlement of the permitting dispute at the heart of the case. As a reminder, at issue in the case is the question whether pollution that travels via groundwater to a federally regulated water triggers CWA permitting requirements. The settlement agreement requires county officials to pay a \$100,000 fine; to make "good faith efforts" to decrease use of injection wells at the particular facility; and to invest in opportunities for wastewater reuse and seek National Pollutant Discharge Elimination System permits. In return, the environmental challengers wouldn't pursue further litigation.

Regardless, the justices might reach the groundwater question through another case, [Kinder Morgan Energy Partners LP v. Upstate Forever](#), which deals with contamination from a pipeline leak in South Carolina. Moreover, the pollution via groundwater issue has also featured prominently in the Waters of the United States (WOTUS) saga. Recall from [last week's TUWaterWays](#), President Trump's administration has proposed eliminating CWA protections for wetlands without surface water connections to jurisdictional waters. As discussed in our [WOTUS comments](#), the problem with a singular focus on surface water connections is that groundwater, just like surface water, can serve as a conduit for pollutants to flow from a non-jurisdictional water to a jurisdictional water. So, stay tuned for groundwater to make a splash in future CWA news.

Bye Bye Birdie

A new [study](#) published in *Science* concluded that the U.S. and Canadian bird populations have plunged by almost 3 billion (~30%) since 1970. Though the study's researchers didn't analyze what is causing the decline, ornithologists typically point to habitat loss, [cats](#), and, increasingly, climate change. In particular, shorebirds experienced the second-largest decline in the study. Climate change and habitat loss are related issues for shorebirds: that is, shorebirds typically breed in the Arctic tundra before migrating south, where they tend to nest along coastlines (i.e., areas that have been developed and/or are flood-prone). In a podcast, one of the study's authors bluntly explained: "[Birds that live right along the coastline and salt marsh are just being literally flooded out.](#)" Though raptors and waterfowl experienced an increase in numbers (thanks to conservation efforts), the study's authors warned that the overall

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:

[Holly Beach Dune Restoration](#)

September 28; Cameron, LA

[Atchafalaya River Basin Project Public Meetings](#)

October 1, 2, & 3

St. Martinville, Henderson, & Plaquemine, LA (respectively)

[Flint is Family Artist Lecture & Reception](#)

October 2; New Orleans, LA

[Bayou Bonfouca Marsh Restoration Planting](#)

October 3; Slidell, LA

[LA Wildlife & Fisheries Commission Meeting](#)

October 3; Baton Rouge, LA

[Envl. Law at the Supreme Court Webinar](#)

October 4; online or in-person (Washington DC)

[Community Conversation on Climate Change](#)

October 4; New Orleans, LA

Water jobs:

[Attorney](#)

California State Water Resources Control Board; Sacramento, CA

[Staff Attorney](#)

Western Environmental Law Center; Helena, MT

[Environmental Analyst \(Drinking Water Specialist\)](#)

New England Interstate Water Pollution Control Commission (NEIWPCC); Various locations, NY

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declines in avian species could cause a “domino effect” across ecosystems and could be [indicative of Earth’s sixth mass extinction](#). [This is fine](#). After all, to offset all this Louisiana’s Coastal Protection and Restoration Authority only needs to make another, what, five(?) Queen Bess Islands. Is that right? We understood that [there would be no math](#).

Run – Don’t Walk – From “The Blob”

It crawls! It creeps! It eats you alive! Wait wait wait we’re not talking about [that blob](#) or [this blob](#), or even [this one](#). Instead, we’re talking about the mass of warm water in the Pacific Ocean off the coasts of Alaska and California. Many have observed that it mimics a [phenomenon that occurred from 2013 to 2016](#), which was dubbed “the blob” because it appears—apparently for lack of a better term—as a blob on heat maps. Scientists are uncertain if this current warming is a new “blob” or merely a continuation of the previous one. [NOAA announced](#) that its forecasters are currently monitoring the new event and are referring to it as “the Northeast Pacific Marine Heatwave of 2019” (sure, it’s a more scientific sounding name, but it clearly does not elicit the same terror and excitement as “the blob”).

The new mass of warm water covers an area of [~4 million square miles](#) (three times the size of Alaska) and features surface temperatures of 5 to 7 degrees above the long-term average. It is concerning because, if it’s anything like its predecessor, it could be [deadly for marine life](#), including the [iconic coral reefs off Hawaii’s coast](#). Moreover, the original blob resulted in a toxic algae bloom along the entire West Coast of the United States, thus affecting recreational activities and hampering the commercial fishing industry. These effects are already being seen today in the state of [Washington](#). One scientist, who developed [a marine heat-wave tracker](#), stated that this warming is “[on a trajectory to be as strong as the prior event](#).” But, another scientist explained that “it could also go away pretty quickly if the unusually persistent weather patterns that caused it change.” In particular, the mass warming “[is caused by a ridge of high pressure over the area that keeps winds calm and allows the sun to warm the water’s surface. The absence of wind keeps the ocean from churning up cooler water from the depths below](#).” Moral of the story: beware of the blob! Oops, we mean the Northeast Pacific Marine Heatwave of 2019.

[Bridge Over Troubled Water](#)

Did someone say [Teddy Bridgewater](#)? No? Guess we’re just excited still from [Bridgewater’s game-winning performance](#) last weekend. Anyway, this story refers to a different bridge and a different water, specifically the Bayou Bridge Pipeline and the [Atchafalaya Basin](#). If you’re currently thinking to yourself, “Hey, hasn’t that pipeline been constructed already?” then you are correct, knowledgeable reader. Construction of the Bayou Bridge Pipeline [was completed in March of 2019](#). However, during the construction process, three Louisiana landowners, whose property includes 38 acres of wetlands in the Atchafalaya Basin, filed suit, alleging that the oil and gas company (Energy Transfer Partners from Houston, Texas) cut down trees and installed an underground portion of the pipeline without their permission *before* completing the eminent domain process. (Louisiana grants oil and gas companies the use of eminent domain to seize land for projects that will benefit the public—[some argue that Louisiana gives the companies too much leeway](#) in the use of eminent domain.) In resolving the suit, a judge in St. Mary Parish ruled that Energy Transfer had the right to take the land but had not followed the proper legal procedures. Accordingly, the judge ordered Energy Transfer to pay each landowner [a whopping \\$150](#).

On September 19, the landowners filed [an appeal](#) of that decision with the Louisiana Third Circuit Court of Appeal, arguing that the use of eminent domain by Energy Transfer was [unconstitutional and violated their property rights](#). The landowners, as well as environmental groups, worry that spills from the pipeline could endanger the fragile Atchafalaya Basin. Perhaps their concern is based on the determination that the pipeline owners experienced [527 hazardous incidents](#) between 2002 and 2017, but [that’s none of my business](#).

Happy sea otter awareness week, and belated happy national estuaries week!

On a cuter, fluffier note, this week is [sea otter awareness week](#)! Did you know that sea otters are a [keystone species](#)? A keystone species is one that is critical to the survival of other species in the ecosystem. Sea otters that have been rescued and re-homed by the [Monterey Bay Aquarium](#) in California have even been deemed “[\[a\]n unlikely savior for California’s coastal ecosystems](#)” because they prey on small herbivorous sea creatures like sea urchins, allowing kelp and seagrass to thrive in the area. Plus, they [adorably hold hands](#)—er paws—while they

sleep to stay together. We hope you have an otterly pawesome time checking out more [fun facts](#), e.g. in addition to coastal waters, sea otters live in estuaries.

Speaking of estuaries, you didn't forget to celebrate National Estuaries Week last week, did you? Of course not. If you still haven't had your estuarine fill, check out this list of [fun facts about Lake Pontchartrain](#) that Curbed created in honor of National Estuaries Week. For starters, Lake Pontchartrain is actually a brackish estuary. [The more you know](#).

Get Your Public Comments Submitted!

On September 16, 2019, the Army Corps of Engineers published for public comment [draft guidelines](#) in accordance with Section 5014 of the [WIIN Act](#), which requires the Coastal Wetlands Planning, Protection, and Restoration Act (CWPPRA) Task Force to issue guidelines for the use, maintenance, and oversight of environmental banks in Louisiana, after public notice and opportunity to comment. The draft Guidelines define an environmental bank as a project, project increment, or projects considered for purposes of restoring, establishing (i.e., creating), enhancing, or preserving natural resources at a designated site to establish credits designed to offset certain environmental impacts. Credits generated by approved environmental banks may be used to address environmental requirements of multiple federal and state environmental programs subject to the approval of the appropriate federal or state agencies responsible for implementing these programs. Written comments regarding the draft Guidelines should be submitted by October 15, 2019 to.