

# TUWaterWays

Water News and More from the Tulane Institute on Water Resources Law & Policy  
January 6, 2023

## WOTUS there left to say?

What better way to ring in the new year than with [514 pages of a new WOTUS \(Waters of the United States\) rule](#)?! Technically the new rule hasn't hit the federal register yet, and it won't go into effect until 60 days after that, but EPA and the Army Corps still managed to eke out a prepublication version in the final days of 2022. Perhaps the good government folks just wanted to [start the new year with the rule off their desks](#), but there might be something more strategic to the timing of its release. You may recall that [SCOTUS surprised everyone last February when it decided to revisit WOTUS in \*Sackett v. EPA\*](#) despite EPA having already announced that it planned to do a rulemaking. This overlap has influenced interpretations of SCOTUS's intentions and predictions on how the Court may rule, but it also left everyone wondering when or how the rulemaking would proceed. Releasing the rule now places it in a position of particular uncertainty and [could even draw targeting from SCOTUS](#). However, had the agencies waited for a decision, they would have had to draft the rule subject to the Court's opinion. The rule will still be contingent on SCOTUS's *Sackett* decision, but the agencies weren't as legally limited in their drafting.

So, with all the freedom of a pre-*Sackett* rulemaking, what did EPA and the Army Corps come up with? The new rule doesn't harken back to either of its most recent predecessors promulgated under the Obama and Trump administrations, but instead reaches all the way back to the 1986 rule with some [Rapanos v. US](#) language [sprinkled in](#). Using the rule that lasted the longest as a benchmark reflects the agencies' intention to create a rule that [stands the test of time](#)—an understandable sentiment after years of definitional tumult. However, that makes the explicit inclusion and heavy reliance on terms such as “significant nexus”—language not present in the 1986 rule and directly at issue in *Sackett*—a curious decision on the agencies' part.

EPA's assistant administrator Radhika Fox described the rule as “[a middle ground that creates as much clarity as possible](#).” Of course, WOTUS wouldn't be WOTUS if it yielded consensus and understanding. And while you may be tired of hearing about it, neither this rule nor the *Sackett* case is likely to be the final word on WOTUS. But hey, at least the new rule provides some interesting [reading material](#) for those of us anxiously awaiting the release of Louisiana's 2023 Coastal Master Plan!

## Expect a BANner year for PFAS

As the clock struck midnight, [fireworks erupted](#), and 2022 gave way to 2023, a [first-in-the-nation ban on PFAS](#) went into effect in

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 legal stewardship of water.

## Coming Up:

Tulane Environmental and Energy Law Summit; March 17-18; New Orleans, LA

[2023 State of the Coast Conference](#); May 31-June 2; New Orleans, LA; [Proposal Submission Deadline](#), January 17

## Water jobs:

[Assistant Professor of Marine Affairs: Fisheries Management and Policy](#); University of Rhode Island; Kingston, RI

[Water Quality Technician](#); Pontchartrain Conservancy; Metairie, LA

[Associate Attorney, Senior Attorney, and Paralegal](#); Earthjustice; Multiple Locations

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Maine. In accordance with the state law originally passed in July 2021, a prohibition on PFAS in rugs, carpets, and fabric treatments marks the first stage in a plan to phase-out the “forever chemicals” from all products in the state by 2030 (except where use is “unavoidable”). PFAS-related regulations also took effect in New York, California, Pennsylvania, and Colorado, with more states to follow throughout the year. This will include implementation of a New York bill signed just before the new year which aims to [eliminate PFAS in clothing by December 31, 2023](#). You could say these bans are becoming pretty PFAShionable...

### **Would you rather...have frozen roads or poisoned waters?**

Regardless of where in the U.S. you spent your final weeks of December, you were likely to have [plans interrupted by the historic winter storm](#). If you happened to be in Europe, on the other hand, you were [\(unfortunately for the winter tourism industry\) spared the snow](#), and therefore spared the annual discussion on what to do about road salt. America heaps more than 20 million tons of salt onto the roads each winter—[more than four times that of our colder, snowier neighbors to the North](#). In addition to the billions of dollars in car, road, and bridge damage the corrosive chemical causes, it also [contaminates drinking water and freshwater ecosystems](#). Accordingly, some local governments have started utilizing alternatives, such as [cheese brine in Milwaukee, and the increasingly popular beet juice](#). Beet juice has proven to be pretty effective, but it comes with its own issues; namely, the sugary runoff feeds harmful algal blooms, an environmental hazard that is decidedly not in need of any additional help.

Take Lake Erie, for example: a recent report found that [only 2 of the 5 Great Lakes have strong ecosystems](#), and Lake Erie received the lone “poor” rating due in large part to its persistent algal blooms. Or consider Cape Cod, where [population increases and antiquated septic systems have filled the area’s freshwater ponds with a mess of poisonous algae](#). As for impacts on property, in both cases the algae problems are expected to affect real estate values. Without [intervention](#) around Lake Erie, property values are expected to decrease by at least \$394.5 million. Additionally, waterfront restaurants and hotels in Ohio experience noticeable declines in revenue during months with larger blooms. In Massachusetts, the sewer system improvements the state is now demanding may cost billions of dollars and push housing costs beyond residents’ means. Between spoiling American waterways and causing [vacation-ruining international issues](#), algae seemed well-poised to become 2023’s first victim of [cancel culture](#) (can we get #AlgalBloomsAreOverParty trending?). But alas, at the eleventh hour a [new study has shown that algae may be the key to saving coral reefs](#). And so the question remains: do we choose dangerous roads, or dirty waters? Perhaps if we all just stay inside during the next snowstorm to ponder this a solution will present itself.