

# TUWaterWays

Water News and More from the Tulane Institute on Water Resources Law and Policy  
April 4, 2017

## WOTUS Heads to SCOTUS

A lawsuit challenging an Obama administration clean water rule is [on its way](#) to the Supreme Court. The rule seeks to delineate which wetlands, streams, and other water bodies fall under the jurisdiction of the Clean Water Act (CWA). The Supreme Court will not actually decide on the merits of the rule, but whether the [6th Circuit Court of Appeals](#) erred in asserting primary jurisdiction over a plethora of legal challenges brought against the rule.

In agreeing to hear the case, the Court denied a motion by the Trump administration to put the litigation on hold. Environmentalists decried the White House's request for a pause in proceedings as a way to postpone indefinitely implementation of the rule. Trump is [no fan](#) of the WOTUS rule, and last month issued an [executive order](#) compelling the EPA and Army Corps of Engineers to revise the rule [along the lines of Justice Scalia's opinion](#) in the migraine-inducing *Rapanos* decision. Though the Supreme Court will not weigh in on the rule itself, the outcome will condense the calendar for implementation or rescission, and settle jurisdictional questions for future challenges to other CWA regulations.

## What's in a Name? Part II

A while back, we reported on some [hilariously droll](#) goings-on across the pond. Britain's National Environmental Research Council was set to unveil a brand new vessel and appealed to the public to name the prestigious ship. NERC asked Britons to [vote on a name](#) for the new boat via the internet. Britons responded in huge numbers and overwhelmingly selected ... *Boaty McBoatface*.

This shouldn't be a surprise to anyone familiar with the barbarous vortex of irreverent groupthink that is the World Wide Web. What *is* a surprise is that officials didn't learn their lesson and *again* appealed to the hoi polloi to name a boat. This time around, a local council solicited names for a ferry linking Great Britain to the Isle of Wight (where [this happened](#)). The plebs responded as before, choosing *Floaty McFloatface* in the [least-stunning UK referendum](#) in recent memory. The digitally huddled masses, having learned their lesson from the defeat of poor Boaty (officially the [RRS David Attenborough](#)), even started a [petition](#) to force decision-makers to accept the name. We say give the people what they want!

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:

[Mississippi River Commission High-Water Inspection Trip](#)

Hickman, Memphis, Greenville, Baton Rouge

April 3-7, 2017

[New Water Music](#)

New Orleans, LA

April 8, 2017

## Water jobs:

[Project Specialist \(Enviro. Initiatives \(Temp\)\)](#)

World Economic Forum

Geneva, Switzerland

[Assoc. VP for Water and Sustainability](#)

Fresno State University

Fresno, CA

[Advocacy Director](#)

Neponset River Watershed Association

Canton, MA

[Program Director \(Climate Resilience\)](#)

Sonoran Institute

Phoenix, AZ

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## **Under The Rocks and Stones**

[There is water underground](#). Up until now, it has been managed through a [patchwork](#) of state laws and common law doctrines. Largely concocted to encourage consumption, these legal regimes generally ignored the hydrological connection to surface water. The future of groundwater management, however, may not be the [same as it ever was](#). At the American Bar Association's annual [Water Law Conference](#) last week in sunny [Los Angeles](#), legal scholars and practitioners discussed and debated some seismic shifts in the legal landscape of groundwater management.

One area of tension relates to how the Clean Water Act (CWA) applies to groundwater. The CWA regulates discharges from point sources into waters of the United States. While groundwater is not a "water of the United States", it often has a hydrological connection to those waters. The contentious "conduit theory" asserts that pollution that travels through groundwater to a regulated waterbody may be subject to the CWA. District Courts are [split](#) on the conduit theory. A court in Virginia recently [upheld its application](#) against Dominion Power. Another [case currently on its way to the 9th Circuit](#) will mark the first time an appellate court has been asked to apply the conduit theory. The outcome of that decision could have far-reaching consequences unless/until the Supreme Court weighs in on the matter.

## **[Competition in Other Places](#)**

In the game Monopoly, the water works costs \$150. The owner is under no obligation to develop it and merely collects payment from unlucky Scotties and top hats that land on the square (side note: [RIP thimble, boot, and wheelbarrow](#)). Reality isn't too different. Water utilities have natural monopolies within their square. If a home or business wants the taps to flow, they have little choice but to pay the utility. For most of the world, this is still the case. Over in England and Wales, however, regulators are [pulling a chance card](#) and hoping that a little competition will help lower prices and improve service.

Beginning April 1st, non-household customers will have access to a new retail market for water services. Commercial users will now be able to choose their water and/or sewerage provider. [Scotland's retail market](#), in operation since 2008, will link up with the newly opened market in England and Wales. Ofwat is the regulatory body charged with implementing and managing this new market. They'll [measure success](#) in terms of lower prices and improved customer service as the UK considers extending competition to the residential market. What any of this actually means and how it actually works is unclear to those of us here at Chateau D'eau. We've all given ourselves headaches trying to walk back initial visions of several competing water companies all tearing up roads to put in duplicative supply and sewer pipes all over Great Britain. If anyone's got some insight on this, it would be greatly appreciated.