

TUWaterWays

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

[January 10, 2020](#)

Corps of Engineers Held Liable for Some Flooding During Hurricane Harvey

Way back in the 2010s, a [ruling](#) by a Federal Court of Claims judge [found](#) that the US Army Corps of Engineers is responsible for the Hurricane Harvey induced flooding of houses that were built in areas identified as potential flood pools above two Corps-constructed reservoirs outside Houston (Texas, for our less-travelled readers) and that it will have to pay up because those homes were “taken” without just compensation. Consternated homeowners from St. Bernard Parish (here in Louisiana, again for our less-travelled readers) might wonder why this is the case for Harvey victims, when their own suit against the Corps over the levee failures in Katrina was [overturned in 2018](#). The distinction between the two cases, and the [Arkansas Game & Fish](#) Supreme Court case that holds here seems to be that in Houston, this flooding was a planned (or at least really, really foreseeable) part of the flood control project that worked more or less as intended, where St. Bernard’s levee failures were the unintentional failure of a project.

This case means that the Houston upstream (up-reservoir?) owners can form a class-action lawsuit against the Corps for damages. If the Corps had purchased flowage easements over these properties when the reservoir was built in the first place, these property owners would probably be out of luck. Of course, it might have meant these areas would never have been built up at all, and everyone would have been saved money and heartache... Well except for the developers who built up the area in the first place. Oh, and it also might mean that the homeowners end up out of luck just like the St. Bernardians if the Federal appeals courts take a dimmer view of applying takings law to these rare and temporary dislocations.

Speaking of The Corps of Engineers, Mississippi Is Suing Them

This year’s historic flooding in the Mississippi River Basin led to the Bonnet Carré Spillway shunting freshwater into Lake Pontchartrain, from whence it then flowed through Lake Borgne and along the Mississippi Gulf Coast. All that freshwater and the heavy nutrient loads it brought (augmented by Mississippi’s own sewage treatment systems) wreaked havoc on coastal waters. Algae blooms were widespread, and tourism and fishing industries [suffered](#). The opening of the spillway was also listed as the reason for the bottlenose dolphin [unusual mortality event](#) along the Gulf Coast. So, Mississippi is [asking a court](#) to order the Corps of Engineers to use the Bonnet Carré Spillway in conjunction with the Morganza Spillway, another spillway higher up on the Mississippi River that sends water down to the Atchafalaya system. Of course, opening the Morganza Spillway causes

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:

[Communities Restoring Urban Swamp Habitat Planting Event](#); January 11; Akers, LA

[Coastal Stewardship Awards Nomination Deadline](#) January 13

[State of the Coast Abstract Submissions Extended Deadline](#); January 13

America’s Wetland Foundation Coastal Communities Adaptation Roundtable; January 14; Thibodaux, LA; Contact: LNoble@americaswetland.com

[Draft Fiscal Year 2021 Atchafalaya Basin Annual Plan Public Hearing](#)

Jan. 14—Plaquemine, LA; Jan. 16—Henderson, LA

[CPRA Board Meeting](#); January 15; Baton Rouge, LA

[Navigating Legal Waters: Water Resources Law Symposium](#); January 24; Baton Rouge, LA

Water jobs:

[Operations and Land Management Assistant Bureau Chief](#); SW Florida Water Mgmt; Brooksville, FL

[Water Policy Advisor to the Office of the Los Angeles Mayor](#); Liberty Hill Foundation; Los Angeles, CA

[Riparian Restoration Director](#); Forterra; Seattle, WA

[Assistant Attorney General \(Water\)](#); Wyoming AG’s Office; Cheyenne, WY

[Urban Stormwater Associate Director](#); American Rivers; New Cumberland or Philadelphia, PA

[Environmental Protection Specialist \(Floodplain Management\)](#); DC Government; Washington, DC

[Executive Director](#); Alabama Water Institute; Tuscaloosa, AL

[Environmental & Energy Law Program Legal Fellow](#); Harvard Law School; Cambridge, MA

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a whole other set of issues, but those would be Louisiana's problem, [not Mississippi's](#). Unmentioned so far is the fact that Mississippi has regularly pushed, as recently as 2007, to bring extra fresh water to the Mississippi Sound ([search for "Violet"](#)) or the [currently spiked Yazoo Pumps](#) project that would likely add more nutrients to the Mississippi's flows by encouraging the conversion of wetlands to agriculture. It's a complicated world, [kids](#), but until serious efforts are made to reduce the nutrient levels in the River, it is hard to imagine anything really improving where the impacts of river water are concerned.

Cracking Open the Most Fundamental, Important, and Successful Environmental Law in American History – [What Could Go Wrong?](#)

(Don't actually watch any of the videos in that link, but just think of them as an endless list of metaphorical examples of what messing up NEPA could do to the place where we all have to live.)

Today, the Trump administration published [its proposal for new regulations](#) for the National Environmental Protection Act. NEPA just turned 50 [last week](#) (who knew that NEPA is a Capricorn?), and has long proven the old adage that "sunshine is the best disinfectant" by requiring public input and scientific review on projects all across the federal government. Glad the government can no longer indiscriminately bulldoze neighborhoods full of black and brown people? Thank NEPA!

Anyways, President Trump pretty clearly hates NEPA. It makes sense. He's a developer at heart, and NEPA slows down indiscriminate development and demands outside perspectives. As the president has pointed out, no one has altered NEPA regulations for 40 years. Even the Obama administration only issued [guidance](#) (which didn't really [satisfy environmentalists](#), either). However, the new regulations are expected (intended) to severely curtail the projects that require NEPA review, the amount of time a NEPA review can take, and the amount of things a NEPA review can consider – specifically looking at the cumulative effects of multiple projects *cough* climate change*cough* is right out.

Even if the new rules make through (no [slam dunk](#)) it may not mean the end of NEPA as we have now know it. Why? First, changing the rules won't change the actual law so count on their compliance with the NEPA statute to be challenged. Second, these regulations are issued by the Council on Environmental Quality (CEQ) – a shop within the White House set up by NEPA. The CEQ issues regulations for how other federal agencies should prepare environmental impact statements. However, as Professor Dan Farber at Berkeley [points out](#), these regulations aren't actually binding and receive a lesser level of deference from the justice system than do regulations from an agency that actually has the congressional authority to issue binding regulations. These CEQ regulations should receive only the amount of deference shown in the "thoroughness, logic, and expertness" shown in their writing. As far as this administration's thoroughness, logic, and expertness goes on environmental laws and regulations, well, they have attempted to [roll back 95](#) different environmental rules, those rollbacks have been [challenged nearly 70 times](#), and the administration has won 4 times.

Additionally, the sticking of these new regulations relies on President Trump's re-election, as it is unlikely that they will be finalized early enough for implementation of the rules to happen before next January. In the meantime, expect plenty of people pouring over these new regulations (us included), comment after comment about how the way NEPA is currently applied is killing the oil and gas industry in this country, which is currently the number one oil and gas producer in the world, and how it's killing jobs in this country, with 3.5% unemployment and some huge long streak of job growth, as well as plenty of comments pointing out that this new way of applying NEPA flies boldly in the face of the congressional intent of the act and will open the door for disasters and boondoggles alike.

We get that there are gripes about how long it can take to do Environmental Impact Statements and how much they cost. But you know what, absolutely nothing in the law requires it to take years and years to document a federal decision. Much—most, we might wager—of the delay is due to project design and construction being underfunded and because it takes qualified people to evaluate the possible impacts and alternatives of a major decision (say, about whether, where and how to build a road) and there are fewer and fewer of those people working in our federal government. But what you won't likely hear any time soon is someone "Man, this permitting is taking a long time. Maybe we should better fund these agencies tasked with keeping Americans safe so that they can do their job in a more timely and efficient manner." Because that would be just [inconceivable](#). What is not inconceivable is that without a thoughtful, transparent record to support major decisions we will get poorer decisions and live at greater risk. How do we know? Because the decision to

build the Mississippi River Gulf Outlet that contributed to the flooding of New Orleans in Hurricane Katrina predated NEPA. If that is what you want in the way of future infrastructure, then this is your [big chance](#).