

TUWaterWays

Water News and More from the Tulane Institute on Water Resources Law & Policy
February 24, 2023

Coastal Land Loss Who?

It may come as a shock, but before dams and locks held sediment hostage and subsidence and sea-level rise tilted the scales, the Mississippi River actually built land (which it still does in the [Atchafalya River](#)). Well turns out—[it's at it again!](#) A new report confirms that the 850-foot-wide crevasse dubbed [Neptune's Pass is in fact building new land off the east bank of Plaquemines Parish](#). For people who frequent the area, this will come as no surprise. But it does add new fuel to the contentious debate between those who want to close the pass for navigation's sake and those who want to let the river do naturally what the state is investing billions to make happen elsewhere.

Summer Wind Is on the Auction Block

Just [wind](#) you thought that it would never really happen, the Biden administration finally announced the [first auction for offshore wind power in the Gulf of Mexico](#). The [demand for offshore wind is through the roof](#)—last year alone, offshore wind-related contracts rose by 36% and the U.S. market saw \$9.8 billion in new investments. And it's not just investors that have [cast their fate to the wind](#)— just this week, [Louisiana joined the Governor's Wind Energy Coalition](#). The Biden administration also thinks the answers are [blowin' in the wind](#) with plans to deploy 30 gigawatts of offshore wind energy by 2030.

The Department of the Interior noted that the 300,000 acres up for lease off Lake Charles, LA and Galveston, TX could power nearly 1.3 million homes. But is that really where this power will go? First, there's the [tricky issue of connecting new energy sources to antiquated transmission grids](#). Also, in Texas there's not much incentive to head offshore when there's plenty of land and wind to go around onshore. Then in Louisiana, only 4 months ago Entergy released its roadmap to net-zero emissions and climate resilience that included [wind only as a small factor and not until its 2030-2040 strategy \(though that's not as far away as it once was\)](#). The report further stated that the utility giant's "long-term transmission and supply planning models do not currently forecast deployment of offshore wind technology." One issue is that Gulf winds aren't like elsewhere in the country. In general, they're much weaker than areas off the Pacific and North Atlantic coasts. That is, until a hurricane comes through which could do more to damage turbines than provide an energy boost. In other words, the demand for offshore wind in the Gulf may be there, but the technology may not—at least, that seems to be the sense giving major utilities pause.

[Industry, on the other hand, seems less worried about the nuances of Gulf wind](#) and have been eyeing the prospect as a means

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:

[28th Annual Tulane Environment Law & Policy Summit](#); March 17-18; New Orleans, LA

[Blue Carbon Law Symposium](#); May 17-18; Athens, GA

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

Water jobs:

[Communications Director](#); Healthy Gulf; Multiple Locations

[Senior Research Fellow](#); Tulane Institute on Water Resources Law & Policy; New Orleans, LA

[Assistant General Counsel – Water](#); Sandia Resort & Casino; Albuquerque, NM

[Water Policy & Legislative Specialist](#); The Freshwater Trust; Portland, OR

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

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

[Legal Fellow](#); Bayou City Waterkeeper; Houston, TX

[Policy and Partnerships Manager](#); Bayou City Waterkeeper; Houston, TX

[Legal Director](#); Orange Country Coastkeeper; Costa Mesa, CA

Restore America's Estuaries; [Manager of Business and Finance](#); [Program Director](#); [Consultant](#); Multiple Locations

[Governor's Fellows Program](#); Baton Rouge, LA

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of producing [green](#) hydrogen. Green hydrogen is a cleaner fuel source for industries that can't rely on electricity alone. The problem is, producing hydrogen is an incredibly energy-intensive process itself, so it will take up a lot of the new capacity needed to transition away from other fossil fuel use. Then again, in a state like Louisiana where 66% of emissions come from the industrial sector, is that really the worst thing? Nonetheless, the green hydrogen interest in offshore projects has turned several environmental groups [against the wind](#) because what seemed like a step towards energy transition may be just another lifeline for heavy polluters. Sounds a lot like the growing reaction to [carbon capture and storage—another venture that seems destined for some Gulf real estate](#). So, we'll be moving carbon offshore for storage and hydrogen onshore for industry, not to mention the continued transport of oil and gas. With over 26,000 miles of pipeline already laid in the Gulf, surely we'll run out of space at some point, right?

A [Zombie Rule](#)

[A Trump-era revision of the Clean Water Act 401 Certification Rule is back from the grave!](#) (Kind of. For now.) Section 401 gives states and authorized tribes the authority to grant, deny, or waive certification of any federally-approved activity that may result in a discharge into waters of the United States (don't worry—[we're not getting into WOTUS today](#)). The implementing rules for section 401 had remained relatively constant since 1971 with the exception of a few interpretative cases. Then in 2020, EPA adopted new 401 rules strictly limiting the time within which a state or tribe has to respond to a certification application to just 1 year and restricting states' and tribes' ability to impose water quality conditions that aren't strictly quality-related (for example, minimum stream flow, fish passage, or recreation provisions). Environmental groups challenged the 2020 revised rule in court, industry groups intervened to defend the rule, and a by-then Biden-era EPA intervened requesting a remand without vacatur while it created a new rule. The California district court granted the voluntary remand—a decision which doesn't require the court to rule on the merits of the regulation. However, it also vacated the rule, not based on the merits, but based on concerns raised in EPA's motion (which asked the court not to vacate...). However, the pre-2020 rules were only back in effect for a short time before the U.S. Supreme Court in response granted a stay pending appeal - meaning the 2020 rule was reinstated without overturning the district court's vacatur. Against this backdrop, [EPA proposed a new 401 rule last summer](#), the final version of which hasn't been published. [Still with us?](#)

Finally this week, the Ninth Circuit officially reinstated the 2020 rule, holding that [a court can't vacate a regulation without ruling on the merits and deeming it unlawful](#). So, a messy and confusing legal saga finally resolves and what does it all mean? Well, probably not a whole lot. Due to the Supreme Court's decision to stay the district decision, the 2020 rule was in effect anyway. The EPA's proposed rule was published with the 2020 rule in effect, so the false vacatur shouldn't cause administrative issues. And before long, EPA will publish a new final rule lawfully vacating the regulations that environmental groups and the district court found so problematic. Still, a lot of time and resources went into unraveling all this (by the agency, the courts, and us in deciphering the madness for this newsletter). And all for what? Perhaps the most significant thing to come out of this (besides the always important lawyers getting paid) will be [another blow to the faith in agency deference at a time when it really can't afford any more bad press](#).

Reminder: We're Hiring!

[The hiring process for our next postgraduate research fellow](#) has begun! The next fellow will join our team in August and be a vital contributor to our work for up to two years. Because it's intended as a postgraduate career launcher position, it's only open to recent law school grads (including graduating this spring), so apologies if that's not you, but please share the posting with someone you know who fits the bill. We'll start reviewing resumes next week, so get them in now!

Feeling Lucky?

It might be the fact that two of the biggest green events of the year are just around the corner. You heard correctly—it's time for the [28th Annual Tulane Environmental Law & Policy Summit](#)! It'll be held at Tulane Law School March 17 and 18. In addition to [good times](#), CLEs will be available. [St. Patrick](#) might try, but he can't top everyone's favorite student run environmental law event.