

TUWaterWays

Water News and More from the Tulane Institute on Water Resources Law & Policy
April 18, 2019

Water Wars [Episode IX: Rise of WOTUS](#)

Wishing for some more WOTUS (Waters of the United States) in your life? Well, as promised, the team here at Chateau D'Eau has waded through President Trump's proposed WOTUS rule and produced a [paper](#), which contains our review of the proposal. Fair warning: the document is 122 pages ([gasp!](#)), but the substantive part is only 7.5 pages long as most of the length is due to the appendices. The document is aimed at helping non-mavens understand what the proposed rule says and the context for its production, which is most unusual.

In sum, the proposal does not and cannot resolve uncertainty about the waters to which the Clean Water Act (CWA) applies; only Congress can ultimately do that. And, by not being clear about what waters the proposal will cover, it will likely spawn even more confusion, uncertainty, and conflict than the regime it seeks to replace. Additionally, the proposal will almost certainly fail to clarify the appropriate lines between the federal and state spheres of operation. Inherent in the proposal is the assumption that waters that fall outside of the CWA's jurisdiction will be either be picked up by the states or somehow not need governmental protection. Neither assumption is supported by history or the current reality. To expect states and private persons with water rights to pick up the supervision, management, and enforcement of a water program is to expect the financially and politically impossible, at least without a far more robust discussion about the aims and impacts of the 2019 Proposal.

The public comment period closed on April 15, 2019. For all the WOTUS die-hards out there, we will provide updates as the Administration responds to public comments and swims toward a final rule.

Groundwater to EPA: ["I Can't Make You Love Me"](#)

The CWA regulates pollution to surface water and requires permits for point-source discharges into surface waters (*which* surface waters is what the whole thing you just read is about). There has been uncertainty about whether the Act regulates *all* pollution that ends up in surface waters, or only direct discharges. After keeping everyone [in suspense](#) for months, the EPA has decided on the latter with the release of its ["Interpretive Statement on Application of the Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants from a Point Source to Groundwater."](#) In sum, the statement announces that the EPA will not regulate pollution to surface water that moves through groundwater. The EPA reasons that if pollution travels through

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:

[Urban Water Series Class & Lecture](#)

April 22, 2019

New Orleans, LA

[Coastal Connections](#)

April 25, 2019

Belle Chasse, LA

[Hypoxia Task Force Networking Session and Meeting](#)

May 14-15, 2019

Baton Rouge, LA

Water jobs:

[Federal Executive Director](#)

Chesapeake Bay Foundation
Washington, DC

[Environmental Law Clinic, Supervising Atty](#)

Stanford Law School
Palo Alto, CA

[Resilience Specialist](#)

United Nations Development Programme
Dominica

[Post Graduate Research Opportunity in Clean Water Community Outreach](#)

Environmental Protection Agency
New York, NY

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groundwater, this “breaks the causal chain” between the source of pollution and jurisdictional surface waters. This decision could affect regulation of pollution from a variety of sources, such as seepage from [coal ash](#) and manure management ponds; sewage collection systems; septic system discharges; and accidental spills and releases.

The EPA guidance comes as the Supreme Court is preparing to hear arguments on the same issue in the case of [County of Maui, Hawaii v. Hawai'i Wildlife Fund](#), in which the 9th Circuit concluded that the CWA covers the movement of pollutants to jurisdictional surface waters through groundwater with a direct hydrological connection (see also the 4th Circuit case [Upstate Forever et al. v. Kinder Morgan Energy Partners LP, et al.](#)) The statement contradicts arguments that the EPA and the Department of Justice made in the *Maui* case three years ago, as well as multiple regulations dating back to the 1990s related to specific sources of pollution. Luckily, the EPA’s new interpretation does not apply in areas where courts have already ruled otherwise, specifically the aforementioned 9th and 4th circuits, which cover [14 states in the West and Mid-Atlantic regions](#). What a country! Here’s hoping that the EPA’s interpretation earns little to no deference in the *Maui* case, considering that the agency crafted it in response to litigation and without going through a full rulemaking process under the [Administrative Procedure Act](#). Over the past two and a half years, it’s consistently turned out that [the APA matters](#), so don’t be surprised if it matters here again.

In This Week’s Edition of Totally Unsurprising Yet Very Worrisome News: Coastal Homes Are Unprepared for Climate Change

According to a new study from the University of Notre Dame titled “[Coastal homeowners in a changing climate](#),” coastal property owners are failing to take basic steps to protect their homes against sea-level rise and hurricanes, even as climate change increases the risk that their homes will be damaged by rising tides and storm surges. Additionally, the study concluded that disaster preparedness research on the “structural vulnerabilities” of coastal homes is scarce. Researchers surveyed 662 owners of coastal properties in and around Wrightsville Beach, North Carolina, which is one of the most densely developed shorelines on the south Atlantic coast. Though these properties are exposed to hurricanes, researchers found that, on average, homes are “minimally protected” against climate risks. Moreover, homeowners had taken “few actions to address the structural vulnerabilities” of their properties, and many were not considering taking action in the future. Researchers also found that more than a third of all surveyed property owners “have not taken a single action to improve their home's resilience.” Between 30% and 50% did not know the impact ratings for their homes’ doors and windows. The researchers consider the survey to be “a microcosm” of other coastal communities along the Atlantic Ocean and Gulf of Mexico, and stress the need for further research.

Once Again! Feels Like It’s Time for a Movie List (Because EVERYONE Missed It Last Week)

Besides talking about and thinking about water, here at Chateau D’Eau we also like talking about and thinking about movies. So here it is: a call for suggestions for a list of movies featuring water. Think along the lines of [The Waterboy](#), [Signs](#), [Rango](#), [Mad Max: Fury Road](#), and [Chinatown](#).

Experiencing déjà vu? That’s because this call for movie suggestions appeared in [last week’s edition](#) of TUWW; however, much to our disappointment, we received [ZERO](#) suggestions in response. Our recent call for a [storms and hurricanes](#) playlist was much better received, so perhaps all of our readers are exclusively music enthusiasts, [not movie buffs](#). Prove us wrong by e-mailing suggestions to Chris at cdalbom@tulane.edu.

Come One, Come All: Urban Water Series Technical Master Class & Public Lecture

Join the Greater New Orleans Foundation and the City of New Orleans for the [Urban Water Series Technical Master Class and Free Public Lecture on Plants + Water: Strategies for Improving Water Quality](#) on Monday, April 22. The discussion will focus on the best techniques for using plants to achieve water quality goals, and how these techniques can be adapted to our local climate and culture. Bryan Seipp and Dan Somers, both with tremendous experience in the Chesapeake Bay area, will discuss their lessons learned with Wes Michaels, a landscape architect practicing in New Orleans, who will translate these lessons to the local landscape. The technical master class will happen from 8:30am-2:00pm at 919 Saint Charles Avenue and is well-suited for those in the design, planning, engineering, and construction communities. Professional credits can be earned by participants. The free public lecture will happen from 5:30-7:00pm at the Norman Mayer Library at 3001 Gentilly Blvd. [Register here](#).