

TUWaterWays

Water News and More from the Tulane Institute on Water Resources Law and Policy
December 7, 2012

Temporary Takings Case Remanded: Permanent Damage is not a Takings Element

The U.S. Supreme Court has remanded *Arkansas Game and Fish Commission v. United States* back to the federal circuit. The court of appeals will have to reconsider its previous holding that flooding caused by the Army Corps' operation of a dam does not cause a "taking" of forest land. SCOTUS found that [government-caused flood damage does not have to be permanent](#) to be considered a public land taking requiring just compensation. Click [here](#) for a copy of the opinion.

Solicitor General Recommends SCOTUS Hear Tarrant

It's been six years since the Tarrant Regional Water District originally filed suit against the state of Oklahoma. The water district contends the state legislature violated the Red River Compact by passing a 2009 bill prohibiting other states from accessing Oklahoma water without the legislative approval. *Tarrant Regional Water District v. Hermann*, which implicates important state interests protected by an interstate compact, was first dismissed in federal district court and the dismissal was subsequently upheld on appeal and denied rehearing. The case has been presented to the U.S. Supreme Court for review, who found the case to be interesting enough to request the solicitor general's opinion (Click [here](#) for a copy of the brief.) Although not unheard of, SCOTUS asks for the solicitor general's advice an average of only twelve times per year. Recognizing the case's outcome would have a practical consequence for the availability of water in major urban areas (e.g. Texas), [the solicitor general filed a brief recommending the U.S. Supreme Court review the case](#). According to Jim Oliver, the general manager of the water district, this is an important step in resolving the legal questions concerning [state] rights to water under the Red River Compact.

Logging Runoff Case is Potentially Moot in the Wake of EPA's Revised Stormwater Regulations

The U.S. EPA issued a final rule November 30 declaring its intention to [revise its stormwater regulations](#). The [new rule](#) specifies a National Pollution Discharge Elimination System (NPDES) permit is not required for stormwater discharge associated with logging roads. Instead, the agency proposes stormwater discharges from forest roads are better evaluated under section 402(p)(6) of the Clean Water Act. This section allows for a broad range of flexible approaches that can better address the complexity of forest road ownership, management, and use. The final rule ruffled a few feathers on Monday morning [during oral arguments](#), particularly those of Chief Justice John G. Roberts. SCOTUS is presently hearing the case, *Decker v. Northwest Environmental Defense Center*, where the question of whether runoff permits are needed for logging roads is being argued. However, in light of EPA's final rule eliminating the need for such permits, the question of [mootness](#) is now on the table.

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:

[January 17, 2013](#)

America's Wetland Foundation
"Big River Provides"
Minneapolis/St. Paul, MN

[February 22-23, 2013](#)

18th Annual Tulane Environmental Summit

[February 27-28, 2013](#)

America's Wetland Foundation
"Big River Moves"
Chicago, IL

Job Opportunities:

University of Wisconsin-Madison Freshwater Institute, Center for Water Policy

- [Assistant/Associate Professor](#)
- [Assistant Director for Center Coordination](#)
- [Research Manager](#)

National Wildlife Federation, Mississippi River Delta Restoration

- [Senior Policy Specialist](#)

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Comment Period extended to Dec 14 for Nonpoint Source Program and Grant Guidelines for States and Territories

U.S. EPA recently issued its [draft Nonpoint Source Program and Grants Guidelines for States and Territories](#), which are revised guidelines for states and territories for the award of §319 grants under the Clean Water Act. The grants facilitate the implementation of nonpoint source management programs. The comment period has been [extended](#) past its original deadline of December 7. States, territories, and interested stakeholders are encouraged to submit comments to 319grants@epa.gov by COB December 14, 2012.

Gulf Coast Ecosystems Restoration Council Scheduled to Hold its First Public Meeting

The Gulf Coast Ecosystems Restoration Council (The Council) will hold its [first public meeting](#) on December 11 in Mobile, Alabama. The Council is responsible for the developing and overseeing the implementation of the comprehensive plan to help restore the gulf's ecosystem and economy. The meeting will introduce members of the Council to the public and allow for public feedback. Those interested in attending can register [here](#).

Missouri River v. Mississippi River

In last week's edition of TU Waterways, we brought to your attention local and national objections to the Army Corps plan to resume the status quo for Missouri River management and decrease its flow into the Mississippi River. Not much has changed since last week. River levels in the Mississippi continue to drop to dangerously low levels and a suspension of barge traffic, which had previously been averted thanks to Missouri River water, is once again threatening our nation's busiest waterway. The Army Corps says navigation along the Mississippi River will be impaired as early as December 11 with a record-low water mark being set December 22. U.S. Senators along the Mississippi River put pressure on the Army Corps last week, who replied it would reconsider its seasonal reduction in water flow from the Missouri to the Mississippi River. However, lawmakers from states along the Missouri River fought back, writing a [letter](#) to President Obama stating the Corps has no authority to increase the river's flow with the sole purpose of helping the Mississippi River. The bitter water wars have begun and the question is [who will prevail](#)? The Dakotas or Mississippi Barges?

New Orleans S&WB Rate Increase Approved by City Council

The New Orleans City Council [voted and approved](#) the controversial S&WB rate increase. This comes in the wake of much discussion around the city as to whether this was warranted and whether there was enough public awareness. With a record budget of \$150.2 million for 2013, funding for the S&WB [budget](#) would flow primarily from the ten percent rate increase each year over the course of eight years. Robert Miller, SW&B Deputy Director, states \$7.3 million of the \$17 million increase would go to currently unfunded initiatives. Skeptics of the proposed rate hike have not been silent about their disapproval, voicing concerns as to how and where the agency allocated post-Katrina funds. Executive director Marcia St. Martin addressed these concerns, stating FEMA money was used to restore certain projects but was simply not enough to help S&WB "move forward with many environmental changes." The vote had been delayed previously, most recently in July by Mayor Landrieu, who had hoped an influx of FEMA federal money would reduce the impact on ratepayer's wallets. Councilwoman Stacy Head spearheaded the recent move to delay voting, stating there had [not been enough time allocated for public engagement or public hearings](#). Head's concerns were shared by BGR's Executive Director Janet Howard, who stated ["the public doesn't know that the council is considering doubling their rates on Thursday"](#) and recommended city council have a proper and adequate notice of a public hearing. Ray Manning, president pro-tem of the S&WB, says he is surprised with the request as [delays like this](#) are what exacerbated the situation in the first place. BGR recently and publicly supported the rate hike stating the increase is comparable to customers in peer cities and would [allow S&WB to make critical investments in treatment plants, sewer networks, new technology for meter reading and customer service](#), but cautions that [not enough details](#) are available as to how the money will be spent.