TUWaterWays

Water News and More from the Tulane Institute on Water Resources Law & Policy
April 8, 2022

Forever No More?

You know about them. We know about them. "Forever chemicals." Chemicals that do good things for waterproof shoes but bad things for people and the environment. Chemicals that are now just about everywhere. Chemicals that last forever and that seem to take forever to do anything about. Until now. Colorado has decided that enough is enough and is proposing (bipartisan mind you) legislation to ban PFAS chemicals in the state—in large part to safeguard its water resources. When one considers how much people fight over water in the West, it is no wonder that it came to this. Will this mean a PFAS-free Colorado in the best traditions of "this town ain't big enough for the both of us"? Not so fast, pardner. It will take years to phase in and there can be exemptions. But for a problem needing a solution so badly but lacking a spark for action, it is a notable step.

Disclaimer

Let's get something out of the way up front: We did not set out to make "water federalism" the theme of this edition of TUWaterWays, but we can see how some readers might doubt that. The fact is that as new water issues are popping up, the traditional roles of state and federal government are being sliced, diced, and reimagined. It puts us all to the point of having great difficulty answering what should be simple questions: if, how, and by whom water and water quality should be managed? Consider yourselves warned of impending wonkiness.

Laws? Protections? Duties? Wetlands? Just How Ephemeral Can They All Be?

If only we had known it. The golden years of water resource management may have already begun to pass (though they did not seem so golden at the time). Sure, the federal Clean Water Act and Rivers and Harbors Act and their various state law counterparts were cumbersome, and it seemed like all we did was whine and fight about them, but they did work. They did blend federal and state interests. They did allow for comprehensive and affordable water management that was actually purpose driven without requiring that everyone agree on just one purpose. And we went down that path for very good reasons. Alas, those were the days. These days, with the reach of the Clean Water Act seeming to shrink with every other rulemaking and court ruling, the burden of protecting water resources is once again shifting to the states, a burden few are prepared for and that some would prefer to punt. Case in point, ephemeral wetlands. These have long been subject to some protection under federal law which meant states did not have to shoulder that load alone. If that protection is

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:

California Water Law Symposium, April 9

University of Denver Water Law Review Symposium, April 14-15

Coastal Law in Louisiana (CLE), April 21- 22

Water jobs:

Attorney III, California State Water Resources Control Board; Sacramento, CA

Water Justice Specialist, Bayou City Waterkeeper, Houston, TX

Sustainability/ESG Director, PwC; multiple locations

Research Associate, University of New Orleans; New Orleans, LA

Research Associate 1, University of Louisiana Lafayette; Lafayette, LA

Advocacy Director, Coalition to Restore Coastal Louisiana; New Orleans, LA

Sportsmen Outreach coordinator; National Wildlife Federation; New Orleans, LA

6325 Freret Street, 1st Floor
New Orleans, LA 70118
504-865-5982

tulanewater.org

TWITTER: **@TulaneWaterLaw**

removed, which many think is one U.S. Supreme Court decision away, who would look after them? "No one" is the answer coming from Ohio, if pending legislation passes which would shrink existing state law protections to mirror any lessening of Federal protection. It is always fair to question and revisit laws to see how well they are working, but where water is concerned, the touchstone has been what functions and values need management. The move in Ohio—and elsewhere—seems rooted in the belief that the political philosophy should dictate the management of public things like water instead of any service- and function-driven approach. That was actually tried before. It is what triggered the golden age in the first place.

You Call That an Emergency?

If the confirmation hearings for Judge (now Justice) Ketanji Brown Jackson's nomination to the Supreme Court of the United States have revealed anything it is that there are quite a few Senators who claim to be worried about activist federal judges who don't follow the law and legal norms and who usurp the rights of states to know what is best for them and their people. Yet, somehow, we seem to have just those sorts of folks on the SCOTUS today—at least where environmental law is concerned. What else could explain its just released emergency ruling in Louisiana et al v. American Rivers et al? That case involves a long standing part of the Clean Water Act (Section 401) that conditions the issuance of federal permits on states and federally recognized Native American tribes determining that the activity would be consistent with the state's water quality standards. Sounds like federalism and states' rights in action, but what is federalism has its limits. Industry and political frustration over the "abusive" failure of some states to grant water quality certifications to oil and gas pipelines and the like led the Trump administration to issue a rule severely limiting how and when states could refuse to issue those certifications. A federal trial court judge threw the rule out (without declaring it invalid, however—more on that in a moment) which triggered an emergency appeal to SCOTUS to keep the Trump rule in effect pending appeal, a request granted by SCOTUS 5-4. The issue here is not the merits of the Trump rule or the district court's action; those will be decided later. The issue is whether reinstating the Trump rule is really an appropriate use of the Court's emergency docket. There are rules about that, but since the majority issued no written opinion, we can't know how they handled those. On the other hand, the dissenters (Kagen, Roberts, Sotomayor, and Breyer) did write and raise serious questions about how much of a departure the majority's decision is—even suggesting that it foretold how the majority would view the ultimate merits of the case, even though those merits have not been argued. If so, then it suggests the court is looking at changing the basic federalist fabric of the Clean Water Act in order to expedite the priorities of certain stakeholders and presidential administrations. Indeed, it already suggests the Court believes states, like Louisiana and Texas, and industry groups such as the American Petroleum Institute, have more at stake in the water management decisions of states like Washington and Oregon than those states, themselves, do.

Coastal Law! Hot Fresh Coastal Law Right Here!

Interested in Louisiana coastal issues and the laws and policies that surround them? Looking for some CLE credit this spring? Need something to fill your social calendar the week before Jazz Fest? Well, we've got just the conference for you—featuring our very own fearless leader, Mark Davis, discussing nutrient management, Mississippi River resources, as well as surface and groundwater rights. The Seminar Group will be putting on the "Coastal Law in Louisiana" conference April 21-22 in New Orleans, with expert panels on topics including flood management and levee issues, oysters and aquaculture, offshore wind energy, environmental justice and coastal planning, and more. So check out the current agenda here and register if you're interested. We hope to see you there!