

# TUWaterWays

Water News and More from the Tulane Institute on Water Resources Law and Policy  
August 9, 2017

## Didn't it Rain

It was a summer Saturday in New Orleans and, though it is hurricane season, the Gulf of Mexico quiet. Then the skies opened. Over the next few hours upwards of 8 inches of rain fell on parts of the Crescent City, producing scenes [reminiscent of Hurricane Katrina](#). New Orleans has a massive drainage system, but it has its limits, even when it is hitting on all cylinders—[which it was not](#) on August 8. So, the questions, recriminations and fall-out have come hard on the heels the flood waters, already resulting in the announced [retirement of the head of the City's Sewerage and Water Board](#) and several firings. Central to the public outcry is the revelation that at least one pumping station was not fully operational and the Sewerage and Water Board's [attribution of the flood to climate change and a "new normal"](#).

The first lesson is a reminder to be both be prepared and candid. Telling people one thing when facts tell them another is [risky business](#).

The second, in regards to the climate change statement, is more complex. While it is not possible to attribute a single weather event to climate change, the trends in New Orleans and elsewhere strongly suggest that brief intense rains are becoming more frequent, so maybe that is becoming "normal". What does not have to become normal are disruptive floods. Floods are a function of both water and how water is managed. Changing precipitation patterns don't have to result in increased flooding if water is managed more thoughtfully and comprehensively. There is no system that can't be overwhelmed, but the rains of August 8 prove that the City's pumps and canals strategy has been pushed to its limits. If there is any good news in all of this, it is that New Orleans and its Sewerage Water Board have already begun exploring [additional water management ideas](#) that could complement its pumping system. Maybe, this will be an impetus to double down on [those plans](#). Maybe.

## **I Read the News Today, Oh Boy**

Maybe the soaking New Orleans got was climate change related and maybe it wasn't, but a draft of the [U.S. Global Change Research Program's Climate Science Special Report](#) certainly suggests that such extreme weather events should be expected. The report was prepared under the auspices of 13 Federal agencies and is cleared by the National Science

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:

**September 8, 2017**

[Fourth Annual River Symposium—Teche-Vermilion Watershed: Building on Regional Progress](#)

Vermilionville

300 Fisher Road

Lafayette, LA

[Louisiana Water Resources Commission](#)

11:00 a.m.

Wednesday, August 30, 2017

LaSalle Building

617 North LaSalle Street

Baton Rouge, LA

## Water jobs:

[Director of Freshwater and Marine](#)

The Nature Conservancy, Texas

Austin, TX

[Legal Fellow](#) (position # 12226431-071817)

National SeaGrant Law Center

Oxford, MS

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Foundation. So, while New Orleans may not have to accept flooding as the new normal, more intense rains may be. The report affirms that climate is changing and that it is “extremely likely” (i.e. 95-100% certain) that “human influence has been the dominant cause of observed warming since the mid-20<sup>th</sup> century”. The report is not filled with much good news, especially its discounting of the notion that warming has paused or stopped in recent years.

The report is making news not only for what it says, but for how it was released. Instead of going through last set of reviews at the more overtly political levels of government, this final draft was released via the New York Times. According to some reports, this was done to ensure the report was not [shelved by the Trump Administration or revised to conform to its policies](#). Those fears might be overblown if U.N. Ambassador Nikki Haley is on target. She is reported as [seeing no reason the report would not be accepted by the Administration](#). For our part, we will adhere to our general policy of respecting the work and doing all we can to prepare for the predicted impacts, but all the while, we’re hoping, deeply hoping, that it is all wrong and that we have [nothing to worry about](#).

### **You Are Now Entering – The Dead Zone**

It was a good news/bad news week for Dead fans. The good news was that it was [Jerry Garcia](#) week, commemorating the week of his birth (8-1-42) and his passage to the Astral Plain (8-9-95). Highlighting the week is [3<sup>rd</sup> Annual Jerry Garcia Moment of Gratitude, an event in which people are encouraged to be kind and to send a million kind vibrations out into the universe](#). Jerry’s legacy is not the only thing that [keeps on truckin’](#), so does that hypoxic mess in the northern Gulf of Mexico, known generally as the Dead Zone. And, while Jerry’s fans are sending positive vibes into the universe, something else is being sent down the Mississippi River and it is not good. The nutrient loads in the Mississippi continue to fuel the growth of algae in the Gulf that deplete its oxygen creating a massive hypoxic zone. This year’s is the [biggest on record](#), which is doubly bad news since by this time the Dead Zone was supposed have been managed into submission thanks to the [Gulf of Mexico Nutrient Reduction Task Force](#). The Task Force was created by US EPA in 1997 to forge a consensual, non-regulatory path to reducing the nutrient loads in the River, loads that largely stem from agricultural runoff higher in the watershed. Over its 20 year life, the Task Force has adopted and revised strategies and action plans in pursuit of a goal of reducing the size of the annual Dead Zone to (on average) [1,950 square miles](#). The result? An average size of [roughly 5,800 square miles and record this year of 8,776](#). [Well done, indeed](#). In fact, it was so well done we felt the need to put together [a Dead Zone playlist of all our favorite songs about death](#). It’s a real upper!

### **Western States Unreservedly Support California in Reserved Rights Case**

In the Old West, there was a saying that whiskey is for drinkin’ and water is for fightin’ over--and that dry land was for Indians. Native Americans figured out long ago that life on the Reservation was a lot better if they had water but that they were going to have to fight states and non-Native Americans to get it—surface water that is. That hash was settled years ago when the US Supreme Court (SCOTUS) ruled that lands reserved for Native Americans to live on forever and ever included rights to reasonable amounts of surface water so as to make life and progress possible. In short, states’ power to define and divvy up water surface rights were constrained by Native American reserved water rights. But what about well water? Do Native American reservations include reserved rights to groundwater, too? According to the Federal Court of Appeals for the 9<sup>th</sup> Circuit, the answer is “you bet.” The [State of California and ten of her sister states don’t see it that way](#) and are asking SCOTUS to rule that state law reigns supreme over groundwater—a position deeply rooted in history and the unhinged hydrology that characterized the evolution of groundwater law in the US. Seems that surface water may be for drinking (and irrigating and such) but groundwater’s still for fighting.