



TUWaterWays

Water News and More from the Tulane Institute on Water Resources Law & Policy

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If Colorado Told You to Jump Out a Window, Would You Do It?

Peer pressure: the strongest force in the cosmos and the only one physics has no explanation for. The same copycat instinct thing that can convince a [guy to chug a six pack in under 40 seconds](#) can [propel a nation to launch a space program](#). It can also make a state do what it probably never would have allowed itself to do on its own. Case in point, California. Everybody knows that California needs lots of water but is not water rich. For that reason, the state has for quite a while allowed wastewater to be reused for irrigation and snowmaking but not for drinking water. The ick factor probably explains the stance more than any actual science. But time to get over it, [Californians](#). [California is now going to let treated wastewater to be used as drinking water](#). What changed? The growing need for new drinking water sources is certainly one, but the fact that Colorado allows it is another. After all, Colorado is a [pretty cool kid](#) who doesn't want to hang with [the dull kids](#).

When I Say Jump, You Say How High. When I Say Never Ever Call That a Water of the United States, You Say....

Respect for chain of command and following orders are really baked into the DNA of the US military (and most others, presumably). But knowing whom to salute and which orders to follow can be a challenge for military organizations that are asked to do nonmilitary things. Just ask the Army Corps of Engineers. For mostly historical reasons, the Army Corps has been in the business of regulating the use (and misuse) of the United States' navigable waters for over 100 years. But nothing stays the same, and that sure goes for laws governing water protection and use. The enactment of the [Clean Water Act](#) in 1972 broadened the Federal government's water protection role and brought the Environmental Protection Agency and the Army Corps into an often uneasy collaboration to administer the Act. Actually, one thing has stayed the same during that time, and that is that no matter what the Corps (and EPA) did to administer the Act, it was wrong according to some court, some members of Congress, some presidential administration and/or some expert with more opinions about the law than the responsibility for carrying it out ([present company included](#)).

The result has been less a methodical development of the law and practice than it has resembled a [game of Calvinball](#). That game goes on. But the Supreme Court's ruling in *Sackett v. EPA* last summer, truncating the previously prevailing reach of the Clean Water Act, at least made clear that wet(ish) lands remote from navigable surface water bodies were not covered by the Act. Of course, that decision did not come with guidance for how the agencies should proceed or deal with pending cases and permit applications. One might think that would engender some momentary breathing room, even sympathy, for the Army Corps. Think again, at least if [Fifth Circuit Court of Appeals Judge Edith Jones opinion in favor of the plaintiff's in Lewis v. Army Corps](#) is any indication. That case involved an ongoing dispute over whether forested wetlands in Livingston Parish, LA were jurisdictional under the Clean Water Act. The Corps vacated their jurisdictional determination and sought to have the case dismissed as moot. Judge Jones was having none of that, concluding mooting the case would not prevent the Corps from reasserting its jurisdiction and subjecting the plaintiff to an "endless loop of financially onerous regulatory activity"

and warning the Corps that if it failed to concede that it lacked jurisdiction over other tracts within the property in Livingston Parish and asserted jurisdiction, that it could be challenged as an act of bad faith under the Equal Access to Justice Act which would impose attorney's fees on the Federal government. We should note that Judge Higginson's concurring opinion took a milder tone on the mootness question and specifically did not join in Judge Jones's admonitions against future Corp's assertions of Clean Water Act jurisdiction as being almost presumptively bad faith.

So, what does all of this tell us? *Sackett* left no room for doubt that Lewis would win this case, but the antipathy and mistrust of the Corps signaled in this case suggest that even when deciding where the Clean Water Act's post-*Sackett* jurisdictional lines are drawn, the Corps may be on a short leash.

Friends, New Orleanians, Countrymen, Lend Us Your Ears.

Time to put the holiday music on pause. The moment you've all been waiting for has arrived. It's time to announce the winner of the greatest contest of the year. For the category "Best Water Song of 2023" the award goes to...[drumroll please...](#) [By the River by Aesop Rock](#)! One might even describe it as the perfect water song—just listen to the first two lines and you'll see. Our colleagues over at the Recording Academy may not have picked up on this hit, but we like to think this honor is just as prestigious as a Grammy. That said, it was a close contest this year. Nevertheless, it is the season of giving, so with that, we'd like to give our appreciation to [this honorable mention](#).

No TUWW Next Week

Water and water law don't take breaks, but we do, and we hope you do, too. Our Institute will be closed next week, and we will not be publishing TUWW again until the first week of January. We hope this holiday season is a happy and safe one for you and yours. See you in 2024.

Coming Up:

Tulane Environmental Law Summit; New Orleans, LA; February 23 & 24, 2024 (save the date!)

Water jobs:

[Administrative Assistant](#), Atchafalaya Basin Keeper, Plaquemine, LA

[Associate, Programs](#); Restore America's Estuaries; Remote (US)

[Research Fellow and Policy Engagement Leader](#); Resources for the Future; Washington, DC

[Water Policy and Science Communications Graduate Student Research Fellowship](#); University of Wisconsin-Milwaukee; Milwaukee, WI



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.

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