

# TUWaterWays

Water News and More from the Tulane Institute on Water Resources Law and Policy  
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## It's a Wetland and That's Final! (And Appealable)

It's a familiar story, it may have even happened to you. A person owns some land that has some peat (think peat moss) in the soil. "That peat could be my ticket to Easy Street," thinks the aforesaid person, and he/she commences to make plans to mine and sell the peat. The day before the backhoe arrives it occurs to him/her that peat soils are often associated with wetlands, wetlands that sometimes are considered to be "waters of the United States" thus requiring a Clean Water Act permit. Being prudent, the land owner seeks a ruling (called a jurisdictional determination) from the Army Corps of Engineers in the hope that the answer comes back saying it isn't.

But they come back saying, "yes, it is."

"That can't be right", he/she thinks "but what can I do?"

Well according to the Supreme Court of the United States, he/she can go to court and challenge that as a "final agency action." In an [8-0 decision](#), SCOTUS ruled against the Corps' position that the time to question the need for a determination is in a later enforcement action (i.e. proceed without permit, get cited or arrested for doing work without a permit, and raise the issue as a defense) or by getting a permit and then suing the Corps for making them do something legally unnecessary. This case offers some welcome clarity on the question of when a Corps JD is challengeable, but it will not likely reduce the pace of challenges to those determinations or to the actual definition of waters of the United States (WOTUS).

Challenges to that definition are headed to SCOTUS with even greater expedition following a [ruling](#) last week by Federal District Court Judge Ralph Erikson suspending challenges to the WOTUS rule in his court pending a related decision by the 6<sup>th</sup> Circuit Court of Appeals or SCOTUS. The road goes on forever but the party never ends.

## Pulling the Plug

The West is often synonymous with cowboys, big red canyons, and big huge dams in those canyons. These dams allowed Western states peace of mind. They would have plenty of water stored for their growing populations, and more often than not, they could stop fighting with their neighbor states. But that is no longer the case as the Colorado River fails to fill its reservoirs. Climate change has caused an increase in temperature and a decrease in rainfall, neither of which 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 stewardship of water.

## Coming up:

### [State of the Coast 2016](#)

New Orleans, LA

June 1-3, 2016

### [RAE/The Coastal Society Summit on Coastal and Estuarine Restoration](#)

New Orleans, LA

December 10-15, 2016

## Water jobs:

### [Staff Attorney](#)

Chesapeake Legal Alliance

### [Clean Water Advocate](#)

Environment America

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good for the huge dams and their reservoirs. Adding further insult to injury, the dams can no longer produce the electricity for which they were originally responsible. Between decreased rainfall and flows in the Colorado, incredible amounts of water lost to evaporation and seepage, and their failure to produce the power they promised, the future is not looking bright for the concrete monoliths. It may be time to [pull the plug](#).

[Glen Canyon](#) may be nearing the end of its life. As the elegant concrete plug to Lake Powell, the Glen Canyon dam was meant to control the erratic flows of the north Colorado River and provide a much needed reservoir. Today however, Lake Powell has been drained to less than half of its capacity. It currently is the largest loss of water on the Colorado, losing 160 billion gallons to evaporation, and 120 to seepage into the ground, which added up over the life of the dam amounts to the total of the yearly flow of the Colorado. Further, in 2014 the agency managing the dam had to purchase \$62 million worth of electricity to supplement the dam's failure to produce. Glen Canyon just doesn't make sense anymore. And it isn't the only one. Across the west a number of dams have been [decommissioned](#) in recognition of the [harm](#) they are doing. There are talks of combining Lake Powell with the [also hurting Lake Mead](#) by simply opening Glen Canyon's gates. But, Tradition! Some cry (and something about having to re-write hard fought water compacts between states...). [Tradition](#), while great for fiddlers on roof tops, often stalls progress. Perhaps we should stop balancing on the ledge of the dam, and pull the plug.

### **Holy Water not Wholly Water**

Early on in this [cycle of existence](#), when the world was young, Lord Vishnu sought to measure the universe. He stretched his toe out to the edge of reality and with his nail cut a hole in the fabric of space. From that hole, the life-water of Brahma flowed to earth as the Ganges River, washing [the lotus-scented feet of Vishnu](#) as it flowed. Through the ages, the river has been a fount of life and an object of worship, and a religious site that draws millions of pilgrims each year. For Hindus, washing in the sacred waters of Ganga Mata (mother Ganges) purifies the soul and cleanses sin.

Unfortunately, the river's theology and hydrology diverged radically as its banks swelled with people. As the Ganges meanders nearly 1,600 miles, from the Gangotri Glacier in the Himalayas to the Bay of Bengal, it drains roughly a quarter of India's land and supports 40% of the population. While the river-cum-deity is still revered as pure, the water it carries is anything but. [Millions of liters of untreated sewage](#), industrial discharge, and storm runoff find their way into the river each year, making it one of the most polluted rivers in the world.

Despite the physical pollution, the Indian Government is looking to cash in on the water's divine qualities. The Minister of Telecommunications [announced this week](#) that his department would develop an e-commerce platform to deliver *Ganga jal* (Ganges water) through the mail. Despite the fact that a bottle of [this stuff](#) could make you very sick, the Government [anticipates demand will be very high](#). The best hope, perhaps, is that viewing the polluted water in isolation will help harmonize the cognitive dissonance of spiritual reverence and civic neglect. And in that harmonious spirit, here's a little [Ganges Delta Blues](#).

### **Is it [Madness](#)? Waukesha, WI Now Just [One Step Beyond](#) That Sweet, Sweet Great Lakes Basin**

Waukesha, Wisconsin has been trying for years to tap into Lake Michigan Basin water that lies just beyond its reach. That water is protected by one of the strongest interstate water compacts in the country, and applications for its water can be vetoed by any of the basin's eight governors. However, after all these years, Waukesha will finally get its application in front of those governors. Their application, with some modifications, has been [approved](#) by the basin's Regional Body. The Body's [review](#) noted that one of the city's other options for water, a shallow aquifer below the town, would actually decrease water flow into the Basin in a way that their application for surface water would not. Once again, water law's disconnect with water science rears its head, so should the application be vetoed in June, the city might be left with just sourcing its water from an aquifer that adversely impacts the Great Lakes' water resources in a way its application would not. At this point, kudos to the town for sticking with this process that has now taken the better half of a decade and not simply sinking a well into that shallow aquifer. [It must be love](#), but they'll only have to wait a few more weeks to know which of [the sun and the rain](#) they'll be feeling.