

TUWaterWays

Water News and More from the Tulane Institute on Water Resources Law & Policy
[May 14, 2020](#)

[Clean Up WOTUS](#)

We're at it again, folks - we [just can't help it](#). We knew that our [full-issue WOTUS update](#) two weeks ago would only keep you satisfied for so long, so we've got more. Since that update, [a coalition of 17 states has sued](#) over the Trump Administration's recently published "Navigable Waters Protection Rule." [They've got a lotta problems with it, and now you readers are gonna hear about it!](#) These states, calling it the "[dirty water rule](#)," allege that it is a "reckless rollback," which ignores science, thus taking too many wetlands and other important waterways out of Clean Water Act jurisdiction. This, they further argue, puts public health at risk. [Good golly](#), who would have thought that polluted water could put health at risk? In addition to these new state lawsuits, two more rancher association groups in [Washington](#) and [Oregon](#) have filed complaints arguing that the new rule is too restrictive and a "federal overreach" (the first rancher group to sue was in New Mexico). All of these lawsuits were filed in different district courts, so we'll see how this shakes out and whether we'll have another situation in which about half of states follow one rule, while the other half follow a different rule. [Good times](#).

In addition to new lawsuits, [House Democrats have introduced a bill](#) to counter this new Navigable Waters Protection Rule, which they have deemed the "most draconian rollback" in Clean Water Act history. Introduced by Representative DeFazio of Oregon and Representative Napolitano of California, this bill is called the "[Clean Water for All Act](#)," and its purpose is essentially to reaffirm the Clean Water Act and protect all of the waterways for which it was intended, thereby "overturn[ing]" the new Trump rule. It further prohibits the EPA or Army Corps from implementing or enforcing that rule, and calls on those agencies to promulgate a new definition of WOTUS in accordance with the Act within two years of its passage. While the Clean Water For All Act likely will get a decent amount of support in the Democratic-majority House, it will almost certainly not make it through the Republican-majority Senate (not to mention a Trump veto). But it's a valiant effort, and it has garnered support from many environmental groups. C'mon, Senate, please [don't let it end this way](#).

And, of course, the Supreme Court's historic *County of Maui v. Hawaii Wildlife Fund* ruling just days after the EPA's rule release has already [had an effect](#) on NPDES issues. For example, in *Kinder Morgan Energy Partners, L.P., et al. v. Upstate Forever, et al.*, the Supreme Court recently vacated a U.S. Fourth Circuit Court of Appeals ruling that held Kinder Morgan liable for a 2014 oil spill and remanded to the appellate court to use the shiny and new "functional equivalent" standard as opposed to the "fairly traceable" standard

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 less stewardship of water.

Coming up:

[Momentum Novum's 16 Hours For Sustainability Web Conference](#); May 16

[Public Comment Deadline re EPA's Proposed Science Transparency Rule](#); May 18

[Drinking Water Microbes 101 Webinar](#); May 19

[Wetlands and Disaster Resilience Webinar: Leveraging Ecosystem Services for Community Preparedness](#); May 19

[CPRA Virtual Meeting](#); May 20

[Review of San Joaquin Valley Groundwater Sustainability Plans](#); May 21

[Public Comment Deadline re: Twin Pines Proposal to Mine Near Okefenokee Swamp](#); May 28

[Public Comment Deadline re: DEQ Proposed Portland Harbor Source Control Decision](#); May 29

[Public Comment Deadline re EPA's Proposed 2020 NPDES General Permit for Stormwater Discharges Associated w/ Industrial Activity](#); May 31

Water jobs:

[Executive Director, Washington Water Trust](#); Seattle, WA

[Climate Change Lead](#); California State Water Resources Control Board; Sacramento, CA

[André Hoffmann Fellow: Ocean Innovations](#); The World Economic Forum and Stanford University, San Francisco, CA

[Environmental Specialist: Public Relations and Policy Coordinator](#); Department of Environment; San Francisco, CA

[Program Coordinator](#); Internet of Water at Duke University's Nicholas Institute for Environmental Policy Solutions; Durham, NC

[Associate Attorney \(water, environmental and local government law\)](#); Bartkiewicz, Kronick & Shanahan; Sacramento, CA

[Water Law Associate Attorney](#); Young Wooldridge, LLP; Bakersfield, CA

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employed by the Ninth Circuit pre-SCOTUS *Maui* decision. All right, with that, we'll give you all some [serenity now](#) from WOTUS (you'll probably get some WOTUS [airing of grievances](#) later in WaterWays issues to come, so we don't want to overwhelm you with too much fun all at once).

The Rivers Are Too [Hot, Hot, Hot](#)

The Columbia and Snake Rivers are important habitat for endangered salmon and steelhead, and keeping those rivers in proper condition for the fish is essential to fisheries, [orca populations](#), and [indigenous tribes](#). These fish journey upriver through already challenging waters and in recent years they have been facing a new set of problems thanks to climate change. The combination of drought, stagnant waters, and warm summers causes low river flows, which means warmer waters in which the fish can neither thrive, nor in many cases, survive. For example, [five years ago](#) thousands of salmon in the Snake River died due to low river flows and warm water temperatures. This is a problem throughout the Pacific Northwest, and with serious drought expected this summer, [Washington State](#) intends to do something about it where the federal government won't. The Washington State [Department of Ecology began issuing](#) Clean Water Act 401 certifications last week to regulate river temperatures at nine dams. This is a victory for environmentalists in an ongoing process and complicated [state v. federal administrative battle](#). In 2019 the Trump Administration announced its intention [to cut back state authority](#) under the Clean Water Act (which is also related to WOTUS, sorry to bring that back up), specifically regarding the 401 permitting and certification process. As for now, Washington is moving forward in their plan to regulate river temperatures, which will hopefully save some salmon and steelhead this summer.

Continue the Chesapeake Bay Watershed Cleanup

Members of Congress in states throughout the Chesapeake Bay area are taking things into their own hands against the EPA as well. States in the Chesapeake Bay watershed have a [history](#), beginning in the 1980s, of working to develop a TMDL ([total maximum daily load](#)) and watershed restoration program in conjunction with the EPA. From 2007-2010, Delaware, Maryland, Pennsylvania, New York, Virginia, West Virginia, and D.C., along with the EPA, established a TMDL to clean up the Bay and a goal for clean water in the Bay by 2025. Some states, like [Pennsylvania](#), are limiting their water pollution in creative ways, such as tree-planting initiatives (Of course, this is only after Pennsylvania fell behind on its goals and faced criticism from their fellow Chesapeake Bay watershed states, but hey [at least they're trying](#) to make up for it!). The state's goal is to plant over 18 million new trees by 2025. The idea is that the trees will help break up the flow of stormwater and filter pollutants. Even with these positive efforts, some members of Congress are still worried that states may not hold up their end of the bargain in the midst of the pandemic, especially in light of the [EPA's allowance of enforcement discretion](#). Therefore, Democratic members of Congress in the Chesapeake Bay watershed states are [asking](#) leaders to disregard the EPA's temporary policy and honor their restoration goals for the Bay in order to make it to clean water in 5 years. These states have made a decent amount of progress: they are over halfway to that goal, so these congress members are urging leaders not to let the pandemic or the EPA slow them down.

Want To Curb Sea Level Rise? Just Dam an Entire Sea!

Sounds like an [Onion](#) article title doesn't it? But alas no, we have not become a satirical news source - this is an actual idea that scientists working at Dutch and German universities [reported](#) back in February (while we were all busy with WOTUS and NEPA and a number of other acronyms affecting water quality). The plan, which they are calling the Northern European Enclosure Dam ("NEED"), would consist of building one dam from Scotland to Norway, and another dam through the English Channel between France and England. This would close off the North and Baltic Seas from the rest of the world's oceans, protecting surrounding areas from threats of sea level rise. These colossal dam structures would cost somewhere between 250-550 billion Euro, which *is* feasible, according to Groeskamp and Kjellsson, if the cost is split amongst all of the protected Northern European countries (15). Keep in mind however that they want this study to be taken [more as a warning](#) than as an actual plan. They point out that it is obviously not ideal and may only become necessary if other more feasible climate mitigation plans fail. Well, at least Northern Europe has got a technologically complicated and costly but possible backup plan if all else fails! Maybe we can do the same here with the Gulf of Mexico (Florida to Cuba, Cuba to the Yucatan Peninsula, and done – assuming Florida itself isn't underwater). Possibilities abound! Funding, not so much.