TUWaterWays

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

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Water When You Need It

Redundancy has gotten a bad rap. Sure, it can mean superfluous or unnecessary where it often is used to justify budget and job cuts. But it also means provisional and ready for use when needed. Like that spare tire in your trunk that might seem superfluous until you get a flat or the safety rope when you're on a scaffolding or crane is superfluous until its isn't. One word, two definitions and it really matters which one you apply. For example, if failure is not an acceptable outcome it just makes sense to have a back-up plan. But that requires that the possibility of failure be acknowledged - which is not often welcomed in the marketing department. That's one of the reasons the *Deepwater Horizon* oil spill was so bad. BP (and all of its regulators and industry compatriots) did not prepare for a spill because they did not believe it would happen. We see it all too often in public water systems too. Lahaina, Maui seems to fall into that sad category. There are many factors that created that profoundly tragic situation, but one seems to be the relationship between the water utility and the electric utility. The water for the community apparently depended on electric pumps to deliver water. Therefore, a reduction of electric power meant less water. In the face of heat and high winds, it is a common practice to for electric utilities to depower some of their transmission lines to reduce the risk of fire. That did not happen in Maui, and when the fires started and electric power went down, so did the water pressure in Lahaina–and with that the firefighting capacity of the town also went down. It is too early to say what caused the fire though ties to the electric grid are one possibility. Regardless, Lahaina was a town without power and without water when it needed both, desperately. This is where redundancy in water systems comes front and center. All too often, water systems are fragile due to age and lack of maintenance. Even ones that are not fragile tend to be brittle. No matter what kind of system you had before the power went down, there are really only two kinds afterwards—those that can maintain service and those that can't. This is where redundancy—back up generation, water towers, prearranged plans for delivering potable water and the like—earns its keep.

Let us be clear, this is not a critique of Maui. For all we know they did a better job than lots of other places—including our hometown of New Orleans which until recently had no reliable back power for its pumps, very aged infrastructure (we still have a lot of that), and no water towers to maintain and stabilize water pressure. Maui needs your understanding, help and support and we hope you give it. More importantly, we hope people look at Maui and learn from it. Maui will move on and won't need the kind of help it needs now, but one place that will always need your attention and help is the place you call home. Investment in infrastructure and utilities in the time of climate change means investment in redundancies—don't let your home drive without a spare or work without a safety rope.

Hot Enough for Ya?

On a hot summer day is there is there anything more refreshing than a plunge into a nearby pool, lake or ocean? Normally yes, but these are not normal times. Certainly not for the Gulf of Mexico which has just chalked up its

highest average surface temperatures on record. 88°F for the first half of August with higher numbers reported for parts of Florida and Texas. True, if the air temperature is over 100 degrees, as it has been for much of the Gulf Coast, that 88-degree water might still be tempting, but the warm temps are important to more than bathers. A hot Gulf can mean a number of things including greater potential for hurricanes and tropical systems, fish kills and coral bleaching, and that is only to name a few. As much as one might hope this is just a Gulf of Mexico anomaly, it isn't. According to the Copernicus Climate Change Service, July 2023 was the hottest month on record. And so it goes.

We Have a Major Question For You

To a critter living at the bottom of a bay getting caught up in shrimp trawl, it may not feel so different from being scoured by a dredge, but the Clean Water Act sure sees a difference. At least that is the conclusion of a federal appeals court in North Carolina. Upset about the impacts of trawling on North Carolina's Pamlico Sound, the North Carolina Coastal Fisheries Reform Group sued a number of shrimpers arguing that they needed to have permits from the Army Corps of Engineers and the EPA because the trawling was tantamount to the discharge of dredged material (covered by Section 404 of the Clean Water Act) and the dumping of by-catch was a point source discharge of a pollutant (covered by Section 402 of the Clean Water Act). Before going further, we just want to say how refreshing it is to have a Clean Water Act case that unquestionably deals with a Water of the United States. Pamlico Sound is without doubt within the jurisdictional reach of the Act. What is not, according to the court, is the trawling and bycatch release. This was not a clear-cut case since a literal reading of the Act could justify coverage. That is not what the courts did in the case, opting instead to apply the "Major Questions Doctrine" and leave the ultimate answer to Congress. The gist is that the wide-spread political and economic ramifications of applying the CWA to these situations weigh against extending the CWA to situations that the court believed to be beyond what Congress clearly intended. This is an interesting use of the Major Questions Doctrine (which didn't exist until 2022. Isn't it exciting to be alive to see the birth of entirely new legal doctrines?). It was not used to review an envelope-pushing interpretation of law by a federal agency but limit to how far a court should go in interpreting a statute. No federal agencies were involved in this suit, which perhaps would have been a more appropriate arena for the development of the case. If nothing else, the clear loser in all of this is any expectation that environmental laws will be broadly applied to new emerging issues without clear Congressional guidance. Good luck getting that. No, seriously, we wish you all the luck in the world. You're going to need it.

Coming Up:

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

Water jobs:

Program Director, Southern Aquatic and Coastal Programs; National Fish and Wildlife Foundation; Washington, DC

Senior Attorney; The Nature Conservancy; Remote

Fisheries Legal Fellow; Conservation International; Various Global Offices

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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