

TUWaterWays

Water News and More from the Tulane Institute on Water Resources Law & Policy
July 8, 2022

[The \(Country\) Road to Environmental Regulation](#)

Ah, West Virginia. Land of the [Golden Delicious](#). Homeland of [Steve Harvey](#). [Inspiration of songs](#). And now, victor of a Supreme Court case. For better or for worse, the [SCOTUS decision for West Virginia v. EPA](#) is out, and, with it, enters a period of uncertainty about what the heck federal agencies are allowed to do now in the face of climate change. In a 6-3 decision, the Supreme Court held that EPA does not have Congressional authority to impose emission limits on existing power plants via “generation shifting” to cleaner sources. When EPA [proposed different methods](#) for emission reduction in 2015, one of the measures was a shift from coal and natural gas to renewables, which focused on overall power systems rather than emissions performances. In plain English, it means that EPA can’t require companies to move away from coal and natural gas-based operation. Basing their [analysis](#) on the “major questions doctrine,” the Court determined that the Clean Air Act does not clearly authorize EPA to perform such an action, and therefore, any similarly sweeping future regulations by the agency must stem from explicit Congressional action. And we all know [how active this Congress has been](#). While the ruling doesn’t completely prevent EPA from addressing GHG ([Administrator Regan has already expressed efforts to move forward with other measures](#)), it certainly puts a damper on EPA’s efforts to drastically curb climate change in a cost-effective way. You know what, let’s just [drop a giant ice cube into the ocean](#). Or not.

This could spell trouble for Children’s Trust climate cases. Before this ruling, they were already dealing with hesitation by judges because of the political question doctrine, which is the principle that some issues are outside of the purview of the courts and lie with Congress. But now, with the Court explicitly stating that EPA needs Congressional approval for things like this, it’s going to be harder to argue that agencies can be held liable for inaction. So, the Executive Branch can’t do anything about climate change, and the Judicial Branch can’t do anything about climate change. That leaves the Legislative Branch. It’s not like Congress has been debating this for 30 years without being able to pass a climate change bill. [Oh, wait...](#) But there is a silver lining: noticeably lacking from the opinion was a discussion of *Chevron* deference, which signals that it’s safe for now. There remains other methods EPA can use to meet the country’s climate goals, so it’s not over yet. Hope is still alive...and [hope is a good thing](#). Whether you think it’s the [end of the world](#) or [not that big of a deal](#), it’s clear that the Justices think the problem of climate change lies in Congress’ court. Ironic, because they’re the ones with a [literal basketball court](#) in the building.

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.

Coming Up:

[Louisiana Climate Initiatives Task Force Public Meeting](#); July 12

[Louisiana Climate Initiatives Task Force Fall Meeting and Workshop](#); October 22

Water jobs:

[Water Quality Technician](#); Pontchartrain Conservancy; Metairie, LA

[Water and Coastal Policy Fellow](#); National Wildlife Federation; Remote

[Legislative Analyst, Coastal and Flood Resilience](#); Environmental Defense Fund; Washington, DC

[Associate Attorney](#); Sher Edling LLP; San Francisco, CA

[Adapting the Existing Built Environment Earth Network Fellowship](#); New York, NY

6325 Freret Street, 1st Floor
New Orleans, LA 70118
504-865-5982

tulanewater.org

TWITTER: [@TulaneWaterLaw](#)

INSTAGRAM: [@TulaneWaterLaw](#)

I Need Water!

Remember when New Mexico sued the federal government for giving too much of its water from the Rio Grande to Texas? And then Texas sued New Mexico claiming that that New Mexico's groundwater pumping was decreasing Texas water? And the Supreme Court [remanded the case](#) to the Special Master Judge Michael Melloy to figure out a solution? And this entire time, poor Colorado was pulled in just because it was a signatory to the 1938 Rio Grande Compact? Well, we [may finally have a resolution on the horizon](#). The New Mexico Attorney General announced that a date in July has been set for a status update. The [Rio Grande Compact](#) requires that Colorado deliver a certain amount of water to the New Mexico state line, and that New Mexico deliver a certain amount to Texas. [Compacts](#) are commonplace in the West because of the water scarcity in the region. Guaranteeing minimum flow is a hassle under normal conditions, but under drought conditions, it's nigh impossible. The [Rio Grande is already compromised](#) by human activity, and now, with the added impact of droughts and heat, only a fraction of its initial flow reaches its mouth at the Mississippi River. For a few hundred miles along its path, the river is completely dry. Parched rivers mean parched cities. The West uses prior appropriation to determine water rights—first in use, first in right; and as long as you can put that water to beneficial use, it's yours. In some states, it's a very powerful doctrine. However, this may need to change, and soon. In early 2021, the Ninth Circuit Court of Appeals [held](#) that, while the public trust doctrine applies to prior appropriated rights, reallocation of those rights is inappropriate when such an action conflicts with state law. The public trust doctrine requires prudent management of trust resources for public. But surely, the public means *everyone*, and not just the select few that were lucky or privileged enough to get to the water first, right? When those who have been using and overusing water resources to the detriment of others, is staunchly sticking to the prior appropriation truly appropriate? [Mull that over for a bit](#).

Highway Away from the Danger Zone

The construction of the [LA-1 Improvement Project](#) entered Phase II with a groundbreaking ceremony in Leeville. The project aims to construct an elevated highway between Golden Meadow and Port Fourchon. Eleven miles of highway from Leeville to Port Fourchon have already been completed, and the remaining 8.3 miles is set to connect Leeville to Golden Meadow. The LA-1 Coalition hopes to also upgrade the existing LA-1 from Port Fourchon to Grand Isle, but funds for that have not been attained quite yet. The original highway is certainly a scenic drive, but officials are concerned about that road being flooded during storms—not to mention sea level rise. These towns are surrounded by wetlands that are in [constant danger of receding](#) and turning the area into bikini bottom. That can also be said of most of coastal Louisiana. But it's not all bad news. [Surface ocean](#) is a [natural carbon sink](#) because of the [phytoplankton](#) that float near the top, and deep-sea sediments seem to be a ["generally safe" way to sequester carbon](#). The point is that, like it or not, we're going to have to learn to adapt to our changing environments while we attempt to mitigate the impacts of climate change.