



TUWaterWays

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

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Get the 411 on 401

The [EPA is proposing limiting states' and tribes' ability to review federal Clean Water Act permits](#) in a new rule announced this week. Like many pollution control laws, the Clean Water Act is structured and implemented through a cooperative partnership among federal, state, and tribal governments. The feds determine the jurisdictional scope and technical standards for treating discharges into waterways, but the states set their own water quality standards and typically administer permitting so long as they remain in federal compliance. A key feature of this balance comes through [Section 401 certification](#) which grants the power to certify, place conditions on, or deny proposed federal permits (most often Army Corps dredge and fill permits) that could have an impact on state water quality standards.

If you've been paying attention to Clean Water Act news over, say, the past decade, you will have noticed that the push to weaken federal environmental laws is often focused on states' rights. As noted by Justice Alito in the *Sackett* majority and countless times in the recent "Waters of the United States" (WOTUS) rule revisions, it is the states' responsibility to protect/manage their lands and waters. Apparently, some states are doing too much by way of protecting those resources. The stated reasoning behind the rule is that states have improperly used their Section 401 authority to delay or block oil and gas pipelines. The rule proposes procedural changes that [would limit states and tribes to consider only direct water quality](#) impacts on "waters of the United States", which are themselves limited in scope in the wake of *Sackett* and WOTUS.

Behind the drama, it seems to be more about promoting U.S. energy dominance (even though the [United States led the world in natural gas supply](#) in 2023). There is arguably going to be an energy emergency soon thanks to the rapid buildup of large/hyperscale data centers that are expected to [consume between 6.7 to 12% of total U.S. electricity by 2028](#). Already, Army Corps' Section 404 permits for such infrastructure projects are on an expedited review under an [executive order from this summer](#).

Now, in many states, this 401 rule might not have much of an impact depending on whether that given state agency often exercises its certification power to more closely scrutinize projects. But it certainly is causing concern in states with more stringent waters and wetlands protections and could foreclose the authority of states who may want to better utilize 401 authority in the future. It all seems at odds with Justice Alito's *Sackett* opinion ([page 27](#)) and the [recent proposed WOTUS rule](#), but maybe there's some logical consistency in there yet to be found. The proposed regulation was [published yesterday in the Federal Register](#), kicking off the public comment period. It closes February 17th. Just in time for [Mardi Gras](#).

Don't Throw Money Down the Drain

New Orleanians know [too well](#) that money would just clog up catch basins and make street flooding worse. Let's state the obvious: the Big Easy has a big problem with stormwater management. The Bureau of Government Research, a local research nonprofit focused on public policy analysis, just released a new report titled "[Paying for Drainage](#):

[Creating Fair, Transparent and Accountable Stormwater Funding for New Orleans](#),” which explores the ways New Orleans funds its stormwater drainage systems.

They report that two property taxes currently fund the bulk of drainage budget, and both have sunset provisions, with one expiring in 2027 and the other in 2031. These two taxes fund almost 60% of current stormwater/drainage management. If New Orleans voters do not renew these taxes, there will be even more trouble. And it very well could happen—in 1992 a tax renewal for Sewerage and Water Board of New Orleans (SWBNO) failed, which eventually led to SWBNO transferring oversight for minor drainage to the city’s Department of Public Works (DPW). Somehow that didn’t work, and management and funding troubles have only continued to worsen since, although small steps have been taken in the right direction. In 2024, the state passed legislation moving responsibility for minor drainage systems (like catch basins) back to SWBNO from DPW in hopes of improving stormwater management by unifying oversight of major and minor drainage back under one entity. Now comes the fun part of addressing decades of underfunding.

Many questions remain unanswered. First, if a stormwater fee is instituted, how will individual properties be assessed in a proposed fee structure? Second, how can the city afford to maintain its drainage systems? Third, how can New Orleans get the public to “buy in?” These questions are particularly tough to answer. Many property owners would be voting on and paying into the drainage system for the first time. Moreover, roughly 37% of property in New Orleans is tax exempt. BGR’s report also outlines key pillars for a fair and transparent tax and fee structure considering a range of factors from property type, size, and impervious areas.

Further, the new mayor’s [recent layoffs at NOLA’s Office of Resilience & Sustainability](#), which had overseen clean energy initiatives and the city’s stormwater planning efforts, raise questions around continued implementation of green infrastructure projects and other resilience programs. An executive order issued on her first day in office dissolved that office and indicated that climate and resilience efforts will be [spread across city departments rather than housed in a single place](#). Few details are available as of now – namely how existing federal grants will be administered. That order does, however, establish a Resiliency Coordinating Council within the Office of Administration. Mayor Moreno also issued an executive order [creating an infrastructure coordinating council](#) aimed at aligning planning between SWBNO and the Department of Public Works. Mayor Moreno asks for us to [give her a shot](#) to show that she cares about these issues. So, [take a chance on Helena?](#)

Though untested in Louisiana cities and parishes, hundreds of cities around the country have implemented stormwater fees, giving a wide range of tested models for SWBNO and the City to consider. Stay tuned to see how the stormwater storm plays out!

Coming Up:

[Environmental Law & Policy Summit](#)
Tulane University Law School; New Orleans, LA; March 5-
7, 2026

Water jobs:

[Senior Attorney, Louisiana Clean Affordable Power; Environmental Defense Fund](#)

[Staff Attorney; Bayou City Waterkeeper; Houston, TX](#)

[Coastal Law CLE](#)
May 7 & 8, 2026; New Orleans, LA



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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