

# TUWaterWays

Water News and More from the Tulane Institute on Water Resources Law & Policy  
December 14, 2018

## Woe Be Unto You, the WOTUS

Thought you could make it to the New Year without another WOTUS story? Well, think again! Back in 1972, the Clean Water Act aimed for “restoration and maintenance of chemical, physical and biological integrity of [the] Nation’s waters.” Well, the “Nation’s waters” came to be termed the “waters of the United States” (WOTUS), and there has been a great deal of wailing and gnashing of teeth over just what that means for the past few decades. As discussed in an [earlier edition of TUWW](#), in 2015 the Obama administration issued a rule clarifying what constitutes such a water. The Obama-era rule extended existing federal protection of large bodies of water to hydrologically and ecologically connected smaller bodies of water, such as streams and wetlands. However, on the verge of the Obama-era rule’s implementation in early 2018, the Trump administration suspended the rule and announced plans to issue its own version. Then, in August of 2018, a federal judge in South Carolina reinstated the Obama-era rule in 26 states, [but the ruling did not impact the remaining 24 states](#) where legal challenges were still pending.

If the WOTUS saga hasn’t provided you with enough [twists and turns](#) already, on December 11, the Trump administration proposed [its new WOTUS rule](#), which severely restricts the number of wetlands and waterways covered by the CWA. Specifically, the Trump proposal erases federal protections for streams that flow only after rainfall or snowmelt, as well as wetlands without surface water connections to larger waterways (i.e. those that are separated from tributaries by land, dikes, or other features). The EPA purports not to know the reach of the proposal, but based on [earlier EPA estimates](#), the Trump proposal will eliminate protections for 18% of streams and 51% of wetlands. This [helpful map](#) shows (tentatively) which waters are still covered under the Trump proposal and those that have lost protection. We’re a long way from the late George H. W. Bush’s [no net loss](#) policy.

Despite its stated goal of bringing clarity and predictability to the WOTUS rule, don’t count on it. Consider an illustration. The proposed rule still covers impoundments of jurisdictional waters (think of a dam on a river) but expressly excludes wetlands behind “dikes, barriers and similar structures” (think levees) and are left wondering where many of Louisiana’s coastal wetlands fit. That is because many are managed marshes whose connection with more traditional surface waters are via control structures and canals. The [25,000 acre Bayou Sauvage National Wildlife Refuge](#) is but an example. Are those diked isolated wetlands or are they jurisdictional impoundments? Furthermore, since comments are specifically requested about whether the

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:

[Coastal Law CLE](#)

March 14 & 15, 2019

New Orleans, LA

**Tulane Environmental Law Summit**

March 22 & 23, 2019

New Orleans, LA

## Water jobs:

[Postdoctoral Research Associate in Communicating Science](#)

William & Mary’s Virginia Institute of Marine Science  
Gloucester Point, VA

[Senior Program Officer, Groundwater/Agriculture](#)

WWF  
Washington, DC

[Climate Advisor](#)

Natural Resources Defense Council  
Multiple Positions, US

[Water Infrastructure Project Manager](#)

Great Lakes Commission  
Ann Arbor, MI

**Tulane Institute**  
on Water Resources Law & Policy

6325 Freret Street, 1<sup>st</sup> Floor

New Orleans, LA 70118

504-865-5982

[tulanewater.org](http://tulanewater.org)

TWITTER: [@TulaneWaterLaw](https://twitter.com/TulaneWaterLaw)

impoundment coverage is even worth keeping, maybe that question will be moot. That said, any definition of WOTUS that excludes such vast tracts of wetlands—that are currently covered and that have always been covered by the Clean Water Act—looks a lot more like legislating by executive fiat than a clarifying interpretation of a statute.

At the close of the 60-day public comment period, the EPA and the Army Corps will review the comments before issuing a final rule, which will almost certainly face a legal challenge from environmental groups, considering the swift [criticism the proposal has already received](#). While the Trump administration claims that the rule change is being done to provide clarity and certainty, there is no reason to believe it will do that any more than the Obama WOTUS rule. Water and wetlands are too dynamic to have any WOTUS definition be clear and certain all the time.

Meanwhile, others suggest that [the real aim](#) of all this is to please golf-course owners and real estate developers. Even the wide [hue and cry](#) that went up against the Obama WOTUS rule on behalf of farmers ignored that agricultural practices were excluded under that rule. Perhaps this Trump rule will leave the Clean Water Act's pollution limits on agriculture [completely dead instead of mostly dead](#)? No matter what the intention, this rule would radically transform American water and environmental law and policy (yes, that does seem to be the intention). That may benefit some, but it will not benefit the waters and wetlands left behind since most states have relied on the Clean Water Act to serve as the foundational protective program. The burdens that would now fall on states to protect its waters and its residents would not be met anytime soon—if ever.

Everyone here at Chateau D'eau is giving the proposed rule a thorough read, and you probably should, too. Word on the street is that this whole [operation](#) is [more concerned](#) with [Justice Scalia's Rapanos](#) opinion than it is with science. Of course, [the same could be said](#) of the Obama administration's attempt to square WOTUS with Justice Kennedy's more-moderate opinion from the same landmark case. The difference there being that Justice Kennedy's opinion was what the Corps of Engineers and the EPA had been trying to regulate to on an ad hoc basis for a decade at that point. [What a time to be alive!](#)

### **Maybe Those Folks at Harvard Really Are Geniuses**

As referenced in an [earlier edition of TUWW](#), since 2012, Harvard Management Co., the endowment manager for "[the Nicholls State of the Charles](#)," has been [acquiring tracts of agricultural land in California](#), as well as the rights to the valuable groundwater below. On the land, Harvard has built a vast grape-growing business on the Central Coast, and these vineyards are currently valued at [\\$305 million](#). While control of water is clearly important in the face of climate change, one might wonder what the logic is behind Harvard's vineyard [operations](#). In a quote in a 2015 New York Magazine interview, [Michael Burry](#) (of [The Big Short](#) fame) explained: "What became clear to me is that food is the way to invest in water. That is, grow food in water-rich areas and transport it for sale in water-poor areas." When grapes are harvested, [their water content is approximately 81%](#). California wine is a globally coveted product, so owning vineyards effectively turns water into revenue. Somebody get me 500 shares of [United Alfalfa](#)!

Though Harvard's investing guidelines point out the importance of respecting local resource rights, some [farmers and other locals worry](#) that Harvard's operations will eventually deplete groundwater resources in the area and unduly influence water-use regulations. Meanwhile, [as local anger and criticism mounts](#), Harvard has applied to build three large lined reservoirs on its Cuyama Valley vineyard. Bet the locals are going to love that like their go-to order at [the Burger Barn](#).

### **The Future of Louisiana Fisheries and Fishers**

Louisiana officials have begun a partnership with the commercial and recreational fishing industries to determine [ways to make fishing more sustainable in the future](#). The state has already created and met with small working groups of fishers involved in the shrimp, oyster, crab, and finfish industries. These groups have been tasked with explaining the issues that fishers are already facing today because of the rapidly-changing coastline, as well as the issues that the industry will have to address in future decades in the face of continued coastal erosion and the effects of major restoration projects. This move is likely in response to [opposition](#) that the state's coastal master plan has received from some members of the fishing industry, particularly due to concerns that sediment diversions will harm the industry. This partnership appears promising—after all, [teamwork makes the dream work](#).

## **Build the Wall!**

No, not [that wall](#) getting all the attention . . . the Texas seawall! The Army Corps of Engineers is currently seeking public input on a coastal protection plan for Texas, and among the possible projects is one to supplement and improve the existing sea wall along the Gulf of Mexico. The plan also envisions a surge barrier system, dune and beach work, and ecosystem restoration. The plan mostly looks at reducing risks related to storm surge; but the Army Corps said that heavy rain, which caused flooding in Texas in 2017 in the wake of [Hurricane Harvey](#), is also being factored into considerations for the project. According to a project manager with the Army Corps, the gates in the project could be the largest in the world. Unsurprising because [everything's bigger in Texas](#).