

TUWaterWays

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

[September 3, 2021](#)

[August 29th Strikes Again in Louisiana](#)

On Sunday, sixteen years to the day after Hurricane Katrina, [Hurricane Ida](#) made landfall in Port Fourchon as a Category 4 storm. With sustained winds of 150 mph, Ida tied for the fifth-strongest hurricane to ever hit the mainland United States. The storm was so strong that for several hours on Sunday evening the Mississippi River was [flowing in reverse](#). The river, which typically discharges 300,000 cubic feet of water into the Gulf of Mexico every second, was instead channeling 40,000 cubic feet of water per second in the other direction.

Of course, most of you already know all this, because a lot of you were directly affected by the storm and are still reeling in its aftermath. The winds knocked out power for over a million people and [affected](#) drinking water and sewage systems in many areas, prompting ongoing boil water advisories in several parishes.

Thankfully, the damage was not compounded by levee failures as was the case sixteen years ago. Throughout Louisiana, the [majority of levee systems](#) held and were not overtopped. This is significant because, although hurricanes are categorized based on wind speeds, [88% of hurricane deaths are from water, not wind](#). After Hurricane Katrina, the state invested \$14.5 billion into rebuilding and improving the flood protection system in New Orleans and nearby communities. However, some areas nonetheless experienced major flooding this week, such as [Grande Isle](#) at the southern tip of the state and [LaPlace](#) on the western bank of Lake Pontchartrain.

Although the levees held strong in this case, the storm's toll on critical power and water systems thrusts the importance of [infrastructure in the age of climate change](#) back into the limelight. Furthermore, Ida's destructive path didn't stop in the Gulf Coast. The storm's effects were felt [all the way across the country](#) as torrential rainfall flooded highways in Philadelphia, shut down rail lines in New Jersey, and claimed the lives of at least 15 people in New York.

The true cost of Hurricane Ida is unknown as its impacts are still unfolding. In Louisiana, search and rescue and infrastructure assessments are ongoing. Additionally, "indirect factors," including fatalities during cleanup, account for [more than half of hurricane-related deaths](#) in the United States. As it stands, most of southeast Louisiana is in the dark, and much of it is underwater. Perhaps we

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:

[French American Innovation Days on Physical Sciences and Engineering Solutions for the Environment \(FAID Green & Blue\)](#); September 13: Innovations in Energy; September 15: Water and the Environment; September 17: Resilience in the Built Environment

[2021 National Coastal Conference](#); September 28-October 1

[Eighth Biennial University of Florida Water Institute Symposium Abstract Deadline](#); October 6

[The Seminar Group: Coastal Law in Louisiana](#); October 21-22

Water jobs:

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

[TMDL and Water Quality Improvement Lead](#); State of Washington Water Quality Program; Lacey, WA

[Program Operations Associate](#); The Ocean Foundation; Washington, DC

[Senior Attorney, Fossil Fuels Program](#); Earthjustice; New Orleans or Texas

[Senior Manager, Environmental Policy \(EMEA\)](#); Amazon; Brussels, Belgium

Louisiana Bucket Brigade; [Campaign Director](#), New Orleans, LA; [Economic Development Manager](#), River Parishes, LA; [Liquefied Natural Gas Campaign Coordinator](#), Lake Charles, LA

[Staff Attorney](#); Great Rivers Environmental Law Center; St. Louis, MO

Sierra Club; [Gas Exports Campaign Representative](#), New Orleans/Gulf Coast, LA; [National Distributed Organizing Representative](#), LA/TX/DC.

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should all be proactive and just remove [August 29th](#) from the calendar next year.

The WOTUS Saga Continues

San Francisco Giants' Coach Ron Wotus announced this week that he will be retiring at the end of this season. [Wait...](#) that's not the WOTUS we're talking about! Let's try this again:

A federal judge in Arizona [struck down](#) the Trump-era Navigable Waters Protection Rule (NWPR) this week. This marks a new chapter in the [never-ending story](#) that is federal water protections. It's getting a little complicated at this point, so let's start at the beginning (again):

EPA regulates the quality and usage of "waters of the United States" ("WOTUS") according to the federal regulations of the Clean Water Act (CWA). However, the CWA doesn't clearly define what qualifies as WOTUS—some bodies of water, like major rivers and lakes, are obviously included; but what about streams and wetlands? The messiest guidance on the matter was a U.S. Supreme Court case, [Rapanos v. United States](#). In *Rapanos*, Justice Scalia issued a plurality opinion (meaning the court did not reach a majority), defining WOTUS as "those relatively permanent, standing, or continuously flowing bodies of water" and "wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right." Justice Kennedy authored a concurring opinion, interpreting WOTUS as bodies of water with a "significant nexus" to navigable waters. The Ninth Circuit later held that Justice Kennedy's concurrence was the controlling standard. Then, in 2015, President Obama passed the [Clean Water Rule](#), clarifying the definition of WOTUS and navigable waters and consequently expanding the number of headwaters, streams, and wetlands that fell under federal jurisdiction. In 2019, President Trump repealed the Clean Water Rule before limiting protections with his own regulations, the NWPR, which followed the reasoning of Justice Scalia's plurality opinion in *Rapanos*.

The case before the court this week was brought by several Native American tribes represented by Earthjustice against the EPA. EPA filed a Motion for Voluntary Remand Without Vacatur. This is an unusual remedy that is used in rare circumstances, such as when vacatur would risk environmental harm or when the agency could potentially adopt the same rule on remand. In this case, Judge Márquez explained that not vacating the order would actually risk environmental harm and EPA's errors in adopting the NWPR involved fundamental, substantive flaws that precluded the possibility of readoption. Thus, the court vacated and remanded the NWPR.

So, what now? Well, the court says Trump's regulations are out. We can't automatically revert to Obama's regulations because Trump repealed them before passing the NWPR. So, after all that, we're right back where we started with *Rapanos*. In the opinion this week, Judge Márquez acknowledged that returning to this interpretation would increase the regulatory uncertainty that had prompted presidential intervention in the first place. However, she reasoned that agencies and industry are still familiar with the "significant nexus" standard and it is a suitable interim option until the agencies issue a new rule.

Whew—what a [rollercoaster](#) ride! If you fear you're suffering from WOTUS whiplash, don't worry—you're not alone!