

# TUWaterWays

Water News and More from the Tulane Institute on Water Resources Law and Policy  
March 27, 2014

## SCOTUS Decides not to Weigh in on EPA CWA Veto

Under [section 404\(c\)](#) of the Clean Water Act, the EPA Secretary can veto a dredge disposal site if she determines “that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.” On Monday, the Supreme Court [refused to weigh in](#) on whether this veto can be used after the Army Corps has permitted the disposal site. In the [appellate court decision](#), the judges reversed the district court and upheld the EPA’s action, finding that Congress intended for the EPA to have “broad veto power” over the permits. Many see this decision as solidifying the authority for the EPA to [veto an enormous copper-gold mine](#) in Alaska, known as Pebble Mine. Whispers of a preemptive veto started on the heels of the EPA’s January release of its three-year study on the mine’s effect on the nearby salmon fishery, the world’s largest. Unwilling to stand for EPA’s “overstep” of authority, Sens. David Vitter and Joe Manchin [introduced a bill](#) to stop EPA’s preemptive and retroactive vetoes of water permits.

## Detroit Entertains Idea of Privatizing Water System, Solicits Proposals

One of the nation’s largest water systems may hit the [auction block](#), as the bankrupt city looks for ways to get out of debt while ensuring that its residents get the services they need. While a final course of action has yet to be decided, privatization advocates are hoping Detroit reignites the national privatization movement of the 1980s and 1990s. Despite the policies of those decades, 85% of water agencies are still publically owned and operated.

## EPA and Army Corps Look to Clarify “Waters of the United States”

Yesterday, EPA Administrator, Gina McCarthy, and Assistant Secretary of the Army, Jo Ellen Darcy, signed and submitted a [proposed rule](#), defining “waters of the United States” under the Clean Water Act, to the federal register for public notice and comment. Two (relatively) recent Supreme Court decisions precipitated the proposed rule, as they “resulted in the agencies evaluating the jurisdiction of waters on a case-specific basis far more frequently than is best for clean and efficient implementation of the CWA.” As [EPA tutorial](#) demonstrates, applying these Supreme Court decisions was not easy. The rule

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:

**[April 7-11, 2014](#)**

**[Meetings of Mississippi River Commission](#)**  
Tiptonville, TN, Helena, AR, Greenville, MS, &  
New Orleans, LA

**[April 8, 2014](#)**

**[Horizon Initiative Water Committee](#)** Meeting  
Garden Study Center, City Park  
New Orleans, LA

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aims to facilitate this process, identifying certain “categorical” water bodies that fall within the definition as well as “other waters” that pass case-specific analysis while excluding certain “specified waters” from the definition. If finalized, the rule would [clarify federal regulatory authority](#) over millions of miles of intermittent streams and millions of acres of adjacent wetlands, which have been hotly contested by business and other interests. As House Appropriations Chairman Hal Rogers (R-Ky.) put it yesterday, “That rule is going to have a tough time up here . . . Getting the money to enforce it is going to have an even tougher time up here.” For those of us who don’t serve in Congress, you will have 90 days to comment once the rule is published in the Federal Register.

### **Are New Deal Public Works Poised for a Comeback?**

House Energy and Water Development Appropriations Subcommittee Chairman Mike Simpson (R-Idaho) and ranking member Marcy Kaptur (D-Ohio) hosted the Bureau of Reclamation yesterday and inquired as to how the Bureau has been able to [maintain aging water infrastructure](#), like dams and reservoirs, in 17 western states with a flat or declining budget. The representatives were particularly interested in how the programs worked, citing the relatively unique 40 year repayment agreements for most project beneficiaries, and inquired into how water infrastructure projects across the country can be structured. The [line of questioning](#) demonstrated the subcommittee’s appreciation for these largely New Deal public works, while acknowledging the current lack of investment in such projects. As Simpson put it, “We’re the beneficiaries of forefathers investing in things for the future; we’re not doing the same.” Well, Congressman, keep asking these questions, and maybe we will.

### **Water-Energy Nexus To Be a Major Stressor in Coming Decades, According to UN Study**

With world population projected to reach 9.6 billion in 2050, the demand for water can go nowhere but up. In fact, it is expected to increase 55% by 2050. The increased demand will not just be for drinking, but it will also seek to quench the thirst of developing nations for electricity. A new United Nation’s World Water Development Report [examines this relationship between water and energy](#), citing that 90% of today’s energy production uses water-intensive techniques. The question is whether a bulk of the world’s energy will come from water-intensive techniques like fracking and tar sands or from sources like solar and wind that use comparatively little. In the end, the report calls for policies that increase water efficiency for energy production and infrastructure and infrastructure projects that are mindful of the potential of water scarcity. Perhaps Sen. Mary Landrieu, chair of the Energy and Natural Resources Committee, just read the report, as evidenced by [her comments](#) at this year’s New Orleans Entrepreneur Week Water Challenge calling for an “energy challenge” at next year’s event.

### **Speaking of the Water Challenge, Congratulations to Tyler Ortego and His Winning Start-Up, ORA Estuaries**

It was a hard-fought competition with four finalists giving the judges and audience their business pitches to see which would win the New Orleans Entrepreneur Week Water Challenge prize of \$50,000 plus legal advice and office space. After a long deliberation (assuaged by the comedic small talk of MC Harry Shearer), the judges awarded ORA Estuaries and its OysterBreak technology as the [2014 winners of the Water Challenge](#). The OysterBreak technology is basically an artificial oyster reef that is engineered to promote oyster growth, and thereby reducing erosion and improving water quality. Ortego’s product is already deployed in five locations along the Louisiana coastline. As Ortego put it, “This is going to be the new definition of a living shoreline.” While he still needs to convince more experts of his product’s superiority, Ortega says the grand prize will help sustain him as he overcomes challenges and expands his business.

### **As Northern States Start to Thaw, Flavored Water Takes on a Whole New Meaning**

This winter, snow-belt states faced tough weather that required greater [amounts of salt](#) to melt ice than usual. New Jersey salted its roads with such frequency that it ran low on supplies. Environmentalists are worried about the effect of salty snowmelt on freshwater marine life, and a [study](#) published by Maryland state officials validates some of these worries. Aquatic species aren’t the only ones affected, as many ratepayers will be getting funny-tasting tap water this spring. This has us wondering whether hints of [cheese brine and beet molasses](#) will be detectable. Only the most refined palates in New York are expected to detect the subtle notes of fracking wastewater.