

TUWaterWays

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

[June 4, 2020](#)

The Deadline is PFAS Approaching to [Spice Up Your Life](#) and the Pool of PFAS Comments

Next Wednesday, **June 10, 2020**, marks the deadline to submit public comments regarding the decision of the Environmental Protection Agency (EPA) to regulate Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS). PFOA and PFOS are two of the most common types of Per- and polyfluoroalkyl substances (PFAS), which are also known as “forever” chemicals. In case all of this sounds like gibberish, just last week we released a paper that discusses PFAS and some of the actions that the EPA has taken to address PFAS. In particular, the EPA is seeking public comment right now about its aforementioned decision to regulate PFOA and PFOS under the Safe Drinking Water Act and about how to regulate PFAS in the future (i.e., on an individual basis, by different grouping approaches, or based on drinking water treatment techniques). Why should you care? Most people have been exposed to PFAS because the contaminants are so prevalent and persistent in the environment (hence the moniker “forever” chemicals): among other methods of exposure, PFAS can make their way into our drinking water supply and food. Moreover, studies indicate that PFAS can produce health effects ranging from increased cholesterol levels to cancer. So, what are you waiting for? Read our [PFAS primer](#) for more background information and inspiration, and then [submit your public comments here](#).

Now that we have sufficiently pressured you to submit public comments, we will provide you with some updates from the general world of PFAS. As attention turned to the COVID-19 pandemic and nonessential work ceased the past few months, this [disrupted PFAS testing](#) across the U.S., particularly in Ohio, Michigan, Pennsylvania, and New York. Additionally, the pandemic has slowed the pace of [complex litigation involving PFAS](#). Broadly speaking, many lawsuits have been brought against manufacturers and users of PFAS by plaintiffs affected by contamination. Some attorneys worry that the pandemic delay will provide the defendants with more time to strategize and bring in additional experts and discovery. Plus, the delay might reduce pressure on defendants to make attractive settlement offers. However, not all PFAS work has ground to a halt. On June 1, New Jersey released the [strictest PFAS drinking water standards](#) in the United States at a maximum contaminant levels of 14 parts per trillion (ppt) for PFOA and 13 ppt for PFOS. This should be welcome news for Garden State residents because last year the Environmental Working Group determined that [more than 500 drinking water and groundwater sources](#) in New Jersey are contaminated with PFAS. Like New Jersey, many states have set their own PFAS standards, feeling that the EPA has been dragging its feet

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 less stewardship of water.

Coming up:

[Recovery & Resilience in Puerto Rico & the U.S. Virgin Islands: Sustainable, Democratic Energy & Public Health](#); June 4

[A Florida Water District's Mission: Water Supply](#); June 4

Public Meeting re NOAA's proposal to expand Flower Garden Banks National Marine Sanctuary; June 8 [afternoon](#) or [evening](#) or [June 11](#)

[NEPA, ESA and Fundamentals of Environmental Law](#); June 9

[CPRA Facebook Live Webinar: Restoration of the Terrebonne Basin Barrier Islands](#); June 10

[PFAS Public Comment Deadline](#); June 10

[Hot Topics in Clean Water Law Webinar](#); June 10

[Oceans Beyond Earth: From Earth's deep ocean to the search for extraterrestrial life](#); June 10

[EPA Watershed Academy Webcast](#); June 11

Water jobs:

[Program Officer \(Corporate Water Stewardship\)](#); World Wide Fund for Nature (WWF); Washington, D.C.

[Policy Specialist or Intern](#); Massachusetts Rivers Alliance; Cambridge, MA

[Senior Legislative Counsel/ Representative](#); Earthjustice; DC

[Staff Attorney](#); Waterkeepers Chesapeake; Takoma Park, MD

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on the issue and that the EPA's non-binding health advisory of 70 ppt for PFOA and PFOS is too low. If all of this has whet your appetite for PFAS activism, consider checking out the movie [Dark Waters](#), which is based on the true story of the attorney who took on a leading PFAS manufacturer, DuPont. And, at the risk of sounding like a very broken record, remember to [submit your public comments](#) by June 10!

Stop Right Now Thank You Very Much

On June 1, 2020, the EPA unveiled the "[Clean Water Act Section 401 Certification Rule](#)" (hereinafter "Certification Rule"), which will limit the states' ability to block energy projects under Section 401 of the Clean Water Act ("CWA"). As it currently stands, Section 401 of the CWA gives states and authorized tribes the right to certify that a federally licensed or permitted project meets state water quality standards. Under the Certification Rule, however, the states' and tribes' scope of review will be limited, and federal agencies will be able to overturn their decisions. Specifically, EPA Administrator Wheeler [explained](#) that states and tribes will no longer be able to cite climate change as a valid reason to block a permit. Rather, they can only assert water quality reasons to prevent a permit from moving forward. The Certification Rule also sets a one-year deadline for states to take final actions on a permit request under the CWA.

The Certification Rule relates back to an [executive order](#) that was signed on April 10, 2019 by President Trump, who expressed his displeasure with states' ability to withhold and delay energy projects and blamed the states for pushing up energy prices. The Administration's actions are particularly aimed at the Northwest and New York. For example, on February 24, 2020, Williams Partners LP [announced](#) that it would no longer pursue its 124-mile long [Constitution pipeline](#) that would have transported natural gas from Pennsylvania into the Southern Tier region of New York before stopping just outside of Albany. The company had faced roadblocks since 2016, including the denial by New York of a CWA Section 401 permit. And, just a few weeks ago on May 18, 2020, New York Governor Andrew Cuomo's administration [blocked permits](#) for the \$1 billion Northeast Supply Enhancement pipeline project, citing water quality and the state's new climate law.

Based on condemning [statements](#) from the California Attorney General, Xavier Becerra, that state may take legal action against the Certification Rule. The Certification Rule will become effective 60 days after the date of publication in the Federal Register (as of this writing, the rule has not yet been published). Expect more coverage as it comes down the pipeline (pun most certainly intended).

We All Wannabe Wise in the Ways of WOTUS

A deal filed on May 26, 2020 marks the first major [settlement](#) following the Supreme Court's April 23, 2020 [decision](#) in *County of Maui v. Hawai'i Wildlife Fund*. As you likely [recall](#), the Trump Administration's new WOTUS rule eliminates groundwater entirely from Clean Water Act (CWA) protections. However, in the *County of Maui* case, a majority of the justices ruled that indirect water pollution (e.g., pollution injected into groundwater that reaches navigable waters) triggers CWA permitting requirements when it is the "functional equivalent" of direct pollution (it's gone all the way [back to the district court](#), for now). In the case behind the settlement (*Conservation Law Found. v. Longwood Venues & Destinations*), the Conservation Law Foundation (an environmental group) claimed that the Wychmere Beach Club violated the CWA by allowing treated wastewater to seep through groundwater into Wychmere Harbor in Massachusetts (think Cape Cod). Under the terms of the settlement, the beach club will install a filtration system and dispose of waste offsite. Additionally, the beach club will conduct a supplemental environmental project that will fund nitrogen reduction programs in Wychmere Harbor. (See [last week's TUWaterWays](#) for the importance of nitrogen and phosphorous reduction efforts. This is something the Gulf Coast knows all too well as we combat the [Gulf of Mexico Dead Zone](#) and are faced with a Mississippi River that is unfit to use at a time when we need it cleaner for coastal restoration projects. But, we digress.) The beach club will also pay \$135,000 in attorney fees and costs to the Conservation Law Foundation. The WOTUS wheel keeps on turning.

Say [Water]'ll Be There

We have [written previously](#) about the saga surrounding dams on the Klamath River, which is California's second-largest river. To recap, a series of dams along the River allow the Bureau of Reclamation to control and direct the flow of the water. The problem is that there is not enough water in the River to slake all the interested parties. Tribal members and conservationists are concerned that there is insufficient water being released to save

the plummeting salmon populations in the River. Specifically, Coho salmon from the Klamath River are listed as threatened under federal and California law, and their population in the river has fallen anywhere from 52% to 95%. Accordingly, members of the Yurok tribe filed a motion requesting that the Bureau of Reclamation be required to release an additional 390 cubic feet per second in releases for flows in the Klamath River below Iron Gate Dam to help the ailing salmon populations. However, on May 22, 2020, [a judge denied](#) the request, instead siding with local water users and the federal government. [Farmers](#) who rely on the Klamath River to irrigate their crops are also unhappy with the situation, saying that they had been promised more water this year and were informed of lower releases only after they had planted. As usual, there is no shortage of water-related conflict in the Wild Wild West.

In the [Headlines](#): Offshore Wind is Taking Over and May [Viva Forever](#)

On May 20, 2020, Denmark [announced](#) plans to build two “energy islands,” which will produce offshore wind capacity as part of the country’s plan to reduce emissions by 70% by the year 2030 (down from 1990 levels) and to become a green energy exporter. With the potential to expand the energy generation capacity in the future, each island will start with a capacity of at least 2 gigawatts (GW), thus doubling Denmark’s current offshore wind capacity. In fact, Denmark believes that the islands will generate more electricity than Danish households’ annual consumption, which might allow the country to export its green power to neighboring European countries. One of the offshore energy centers would be built on an artificial island in the North Sea; and, the second hub has been earmarked for the Danish island of Bornholm located in the Baltic Sea. Despite this noble pursuit, Denmark recently [came under fire](#) from climate activist Greta Thunberg. She criticized the country because the capital city, Copenhagen, has been dumping wastewater for the past six years into the Oresund strait that separates Denmark from Sweden. This has occurred during heavy rains when Danish treatment plants could not handle the large volume of water. Thunberg pointed out the hypocrisy of Denmark dumping the wastewater into the strait while simultaneously claiming to be working towards reduced emissions, as discussed above, and [carbon neutrality](#) by the year 2025.

Closer to home, Ohio officials have [approved](#) plans to build North America’s first-ever freshwater offshore wind farm, the Icebreaker, which will be constructed off the shore of Lake Erie near downtown Cleveland. It will include a 12-mile long submerged cable to transmit the electricity generated by the wind turbines to Cleveland. The Icebreaker could generate 20.7 megawatts of energy or enough to power 7,000 homes. Additionally, the Icebreaker will be unique because there are only five freshwater offshore wind farms in the world due to [challenges posed](#) by winter ice in freshwater, which challenges are not an issue in saltwater. Specifically, frozen saltwater tends to hang below the waterline, but frozen freshwater tends floats on top. In freshwater, winter winds and water currents push these surface-level ice sheets around and can pile them 30 to 50 feet high close to the shore, thus wreaking havoc on waterfront infrastructure. To address this on the Icebreaker wind farm, the turbines will have inverted cones at the water level. The idea behind the design is that by tapering from a wide flare higher up on the mast down to a narrow base at the waterline, the cone can deflect ice flowing toward the masts. If constructed, the Icebreaker will be unique for another reason: while Europe has 105 offshore wind farms, the U.S. has only one currently. (The Block Island Wind Farm, which began generating electricity in December of 2016, is located 13 miles off the coast of Rhode Island.) The U.S. Department of Energy estimates that Americans shores have the capacity to produce more than 2,000 GW of power, which is nearly double the nation’s current electricity use. Proponents argue that Great Lakes wind energy has some advantages over locations along the Atlantic Coast, such as shallower floor depth, smaller waves, no hurricanes, electrical grids close to shore, fewer effects on commercial fishing, and competitive wind speed. Plus, Icebreaker is a pretty cool name, so it has that going for it too.