CURRENTS

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ENVIRONMENTAL

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LEADERSHIP
INSIGHTS

Navigating Uncertainty by Embracing Partnerships

Maria Gou | Environmental Division Manager

This year started with a lot of promise and enthusiasm. Our nation's economy was doing well, there were strong forecasts for growth in many sectors, and—for me personally—I was excited about stepping in as manager of POWER's Environmental Division.

Transitions are often invigorating, but sometimes things don't go as planned. Enter the COVID-19 pandemic. In today's environment, making decisions is particularly difficult for data-driven thinkers such as myself. We like certainty and stability.

Although every situation has its own set of challenges, I find the key to successfully navigating change is embracing partnerships.

Staying Flexible and Responsive

Many phrases describe the present day: *unprecedented, tumultuous, disruptive, uncertain*. The entire world and certainly our nation are going through difficult health, political, social and financial stress. Triggered by the pandemic and socioeconomic tensions, 2020 has certainly challenged us all.

In the various roles I have served over the years, I have benefited from being adaptable and prepared for the unexpected. Along with so many other firms and businesses, POWER has adjusted the way we live and work. We are focused on the long term, with a primary goal of ensuring the health and safety of our families, our teams and our clients.

Our commitment to our clients remains unchanged. In fact, it's perhaps grown stronger since the pandemic began and the market sectors we serve—including energy, oil and gas and petrochemicals—qualified as essential services under the stay-at-home orders of most states. Our clients are working harder than ever, and we are there to support them every step of the way.

The partnerships we've built over the years have proven to be vital to our continued success in these challenging times. And adversity provides us the opportunity to continue to strengthen these relationships.

- Partnerships built on our clients' trust help us adapt to any situation and lead to successful project execution.
- Partnerships among our colleagues and project teams help us through difficulties and we grow stronger together.

Sharing Knowledge

One of the ways we build trust is by communicating and sharing our expertise. As engineers and scientists, we seek continued knowledge to become experts in our field, and we're eager to share that expertise to benefit our clients.

This year, we're celebrating 25 years of publishing *Currents*! Through this publication, we've shared knowledge and perspectives and often had some fun along the way, particularly with the *From the Trenches* articles.

The constancy of reaching out and communicating valuable information reminds us that especially in turbulent times, relationships are vital for stability and our professional fulfillment. We are committed to this mission and thank you for your partnership through the years.

Looking Ahead

While we look to the future trying to glean what the "new normal" will be, as leaders, we depend on our colleagues and partners. POWER's culture of putting clients first, working as a team, staying flexible and being transparent will carry us through the months ahead.

POWER has always focused on the mutual success of our clients, our employees and our company. Continuing to cultivate that mutual success will be the result of maintaining shared trust with our clients and bringing value through these uncertain times.

AS WE CELEBRATE 25 YEARS OF *CURRENTS*, we want to take a moment and thank you, our readers, for your loyalty and support of *Currents* throughout the years. In honor of this milestone anniversary, be on the lookout for some fun content over the next several months. We'll be pulling some oldies but goodies from the archives and asking staff to share on-the-job experiences, straight "from the trenches."

Why Doesn't Melted Cheese Stick to a Food Wrapper?

Dennis Schucker, Ph.D., P.G.
Senior Geologist and Project Manager

The answer can be found in an alphabet soup of acronyms—PFOS, PFOA, PFAAs, PFNA, PFBS—just some of the thousands of per- and polyfluoroalkyl substances commonly referred to as PFAS.

The properties of PFAS include thermal and chemical stability with a strong ability to repel grease, oils and water (think Teflon, Scotchgard and GORE-TEX).

These unique properties make PFAS ideal for developing useful consumer products such as grease-resistant paper used to manufacture food wrappers and microwave popcorn bags. Other items include stain-resistant clothing and carpets, water repellant boots, nonstick frying pans, as well as cleaning and personal care products like dental floss and shampoo.

On a more industrial scale, PFAS have been used at metal-plating facilities, electronic manufacturing facilities, oil recovery operations and, of particular concern, in aqueous film forming foam (AFFF), which is also known as firefighting foam. AFFF has been used extensively at military bases, airports, oil refineries, chemical manufacturing plants and firefighting training areas.

These chemicals have been used in consumer products and industrial applications since the 1940s, but only recently garnered national interest when PFAS compounds were detected in drinking water supplies throughout the country.

That's why, even if your business doesn't manufacture anything or use firefighting foam, you may still need to be concerned with PFAS.

The Effects of PFAS

The potential toxicity and human health effects of PFAS are not completely understood. Findings from human epidemiology studies suggest that increased cholesterol levels, low infant birth weights, immune system issues, cancer and other ailments may be associated with exposure to some PFAS chemicals.

However, potential health effects of one PFAS chemical may be very different from another PFAS chemical. Health effects appear to be a function of the specific PFAS chemical's composition, and studies show that long-chain PFAS (containing six or more carbon atoms) are more persistent and bioaccumulative (i.e., become concentrated inside the body) than shorter-chain PFAS.

For this reason, many long-chain PFAS compounds have been replaced with shorter-chain compounds in manufacturing. This

Learn how PFAS compounds travel through various waste streams at www.powereng.com/pfas

Packaging problem. *A study conducted in 2017 identified grease-proof PFAS coatings on 46% of food-contact paper and 20% of paperboard samples collected from fast food restaurants across the U.S.*

is the case for two of the best-known and arguably most-studied PFAS compounds—perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS).

Although many manufacturers have switched from PFOA and PFOS to newer, shorter-chain PFAS, testing methods and toxicity studies are not available for many of these replacement compounds. Their potential presence in the environment and the potential human health effects are unknown.

The Scope of the PFAS Problem

Many questions still exist concerning the magnitude and extent of PFAS in the environment. We really don't know if PFAS chemicals are everywhere, as recent media coverage may suggest, but it is known that the presence of PFAS in the environment extends beyond manufacturing facilities and other industrial applications that use PFAS and firefighting foam.

Furthermore, some PFAS chemicals are very slow to degrade in nature and the term "forever chemicals" has been coined to describe the presentient nature of these compounds.

Landfill leachate and wastewater treatment plants can be another source of PFAS releases to the environment. Consider the PFAS-coated popcorn bags, fast food wrappers, old carpet and clothing that eventually end up in sanitary landfills or construction and demolition debris landfills.

How many PFAS-containing consumer products and building materials are disposed of in these landfills? How much PFAS will leach from these discarded materials and enter the groundwater? To date, only limited studies have been conducted to investigate these issues.

For a municipal sanitary sewer plant, PFAS enters the plant with the wastewater, but where does it go? PFAS-containing water may be discharged from the plant following treatment; however, PFAS have been detected in biosolids generated from wastewater treatment. These PFAS-containing biosolids are often applied to agricultural land where the chemicals can leach into groundwater.

Long-term application of biosolids in areas containing drinking water supply wells may have the potential to significantly impact drinking water. PFAS may leach from the applied biosolids and enter surface water. Additionally, plants growing in soil where these biosolids have been applied may uptake the PFAS and be directly ingested by humans or livestock.

PFAS bioaccumulates in animals and humans and has been detected in dairy cows and milk products. In fact, long-term studies by the U.S. Agency for Toxic Substances and Disease Registry indicate that most people in the U.S. have been exposed to PFAS and have some level of PFAS compounds in their blood.

Regulations and Guidance: An Ever-Changing Environment

Because of the apparent widespread presence of PFAS in the environment, and the possible health effects, guidance and regulation at both the federal and state level is rapidly evolving.

The U.S. Environmental Protection Agency (EPA) issued a Lifetime Drinking Water Health Advisory of 70 parts per trillion (ppt) and published a screening level of 40 ppt in groundwater for federal clean-up programs.

While EPA continues the regulatory evaluation of PFAS in drinking water, many states have developed more conservative drinking water target levels ranging as low as 10 ppt to 20 ppt. This regulatory patchwork is expected to remain for the foreseeable future.

Although the process of evaluating the science and risk concerning PFAS

Melted Cheese >>> continued on page 10

The Importance of Effective Communication

Ashley Taylor | Environmental Specialist

We all know the saying "communication is key," and understand that success depends on effective communication.

Whether it's critical project details or potential compliance issues, miscommunication can lead to unnecessary challenges, violations and, in a worst-case scenario, penalties.

As an environmental specialist, I spend much of my time assessing and documenting compliance for environmental permits and regulations for natural gas pipeline projects.

Over the course of my career, I've experienced several situations where a lack of communication caused costly delays, so I'm sharing lessons I've learned along to way to avoid communication missteps.

My first communication lesson occurred when I was trying to submit multiple water and blasting permits for a pipeline construction project. The construction crew requested the submittal be done as soon as possible, so I promptly notified the appropriate personnel of the information needed.

As the information started to come in, however, I quickly realized there were too many people involved. I received conflicting answers from the construction team, resulting in confusion and multiple days of back-and-forth communication to confirm the correct information.

It became clear that, although everyone was trying to be helpful and provide the needed information quickly, the process would have been much smoother and faster with one established point of contact.

My second communication lesson came after an incident occurred on a pipeline project that caused damage to the area and required extensive restoration work. The event attracted the ongoing attention of federal and state agencies as well as a concerned public.

Restoring the area required coordinated efforts from environmental, construction, engineering and land groups. Multiple times the engineering and construction teams proposed changes that hadn't been communicated with the land and environmental groups for input, and what should have taken a few weeks ended up taking several months.

The most important lesson I've learned over the course of my career is to take the time necessary to make sure everyone has the same information.

In hindsight, providing a written list of items for design consideration would have streamlined the communication flow across the disciplines and reduced the time for a meaningful plan.

Finally, my third communication lesson arose after a serious violation was narrowly avoided on a project regulated by the Federal Energy Regulatory Commission (FERC). To provide some background, project changes or modifications outside of previously-approved work areas require that a variance request be submitted to FERC.

On one project, as we approached the end of pipeline construction and were in the process of restoring the right-of-way, most of the team involved with submitting FERC variances had moved on to new projects except for the head land agent and me. We were now managing a new team to see out the project's conclusion.

One day, I received a request for a variance to retrieve material that had fallen outside our approved limits of disturbance. This was a fairly simple and straightforward request as there were no environmental issues involved. The client agreed the variance was needed, and the only pending item was to obtain landowner approval.

Shortly after the variance request was received, I got an email from an inspector stating landowner approval had been received and that I should submit the variance immediately because construction crews were nearing the work area. Although I was unsure if we, in fact, had received landowner approval, the inspector said the field land agent confirmed the permission had been received.

After submitting the variance to our FERC third-party Compliance Project Manager (CPM) for approval, I realized I still had a nagging feeling about the situation and called the lead land agent directly.

Sure enough, the landowner permission mentioned by the inspector was for a different variance, not for our submittal.

I immediately called our CPM and told her to hold approval for our variance because landowner approval had not been obtained. We were able to get back on track and avoid further problems.

Shortly after this incident, I held a call with the team to review the approval process and the importance of following protocols to avoid miscommunications, especially those that might lead to serious violations.

We learn from experiences that go wrong (or nearly go wrong), making improvements based on those lessons. The most important lesson I've learned over the course of my career is to take the time necessary to make sure everyone has the same information. Consider communicating not only *what* is needed, but *why* it's needed.

In my job, I do not see or understand everything that goes on behind the scenes for the engineering or construction teams. Often, they have information that, if I knew or understood, would make processes more efficient and allow for better collaboration and problem solving.

Working together and communicating needs will sometimes highlight blind spots, and in other circumstances may help avoid costly mistakes. It's important to take the time upfront to make sure everyone has the information needed for a safe, efficient and compliant project.

A clear path. *A pipeline or electrical transmission line generally follows a long, narrow stretch of land, called a right-of-way, which designates a safe and clear corridor to install and maintain the line.*

Team Cohesion in a Virtual World

As the COVID-19 pandemic keeps most of us at home, many teams are facing a new reality of working remotely.

Throw in school closures and the pressure to maintain a work-life balance, and you have an environment that makes effective communication a challenge. So how can you replicate the in-person team experience virtually? Here are some tips for staying connected.

1. **Take Advantage of Technology:** In the new world of social distancing, technology is your friend. Tools designed to enhance remote team communication can help you host virtual gatherings to stay connected, collaborate on documents or manage workload.
2. **Establish Regular Check-Ins:** Create a structured cadence for communication within your teams, such as monthly team meetings, weekly one-on-one check-ins and quarterly team strategy sessions.
3. **Turn on the Camera:** When people can see each other, they are more connected, engaged and productive. Face-to-face meetings bring back some sense of community and camaraderie that can't be replicated by instant messaging or talking on the phone.
4. **Make It Fun:** Schedule a video call to get everyone together for a coffee break or happy hour. No agenda or shop talk. Give them the opportunity to simply relax and share what they've been up to.

NEWS BRIEFS

Stay informed on environmental regulatory news and updates

NATIONAL NEWS

EPA Announces Proposal to Retain Current NAAQS for Ozone

On July 13, the U.S. Environmental Protection Agency (EPA) proposed to retain the current 70 parts per billion (ppb) National Ambient Air Quality Standard (NAAQS) for ozone, set in 2015. They stated that the current scientific information supports the conclusion that the 2015 standard protects public health. The Clean Air Scientific Advisory Committee, independent science advisors, also reviewed the proposal and concurred with retaining the previous 2015 standard. EPA will accept comments on this proposal for a 45-day period after publication in the Federal Register.

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U.S. Supreme Court Reinstates NWP-12 for New Oil & Gas Pipeline Projects

On July 6, the U.S. Supreme Court ruled to reinstate and authorize the U.S. Army Corps of Engineers' Nationwide Permit 12 (NWP-12) for new oil and gas pipeline projects. The Keystone XL pipeline, however, was excluded as part of the resurrection of this permit authorization. Since the District of Montana Federal Court ruling in April and the subsequent amendment of the ruling in May for failure to properly assess Endangered Species Act (ESA) risks, there have been limited permitting options and increased delays for oil and gas pipeline projects until this ruling.

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States Pushing Back on EPA's Temporary Enforcement Discretion Policy

In early June 2020, attorneys general for nine states (New York, California, Maryland, Illinois, Michigan, Minnesota, Vermont, Oregon and Virginia) filed a brief in U.S. District Court asking the court to issue a preliminary injunction to halt EPA's "enforcement discretion" policy. This policy was outlined in a memorandum released by EPA in late March 2020. News outlets, such as National Public Radio, reported that state regulators have been inundated with requests to relax enforcement of environmental regulations. Meanwhile, in late June 2020, EPA released a memorandum stating that the temporary "enforcement discretion" policy will terminate on August 31, 2020.

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TRI Reporting Requirements for 172 PFAS Compounds Officially Added

On June 22, EPA published a final rule in the Code of Federal Regulations that will officially implement the Toxics Release Inventory (TRI) reporting requirements for 172 per- and polyfluoroalkyl substances (PFAS) as required under the National Defense Authorization Act (NDAA). Addition of these PFAS compounds to TRI reporting is effective as of January 1, 2020. Facilities in TRI-regulated industries should track and collect data for these 172 PFAS chemicals during 2020. Facilities that are required to report to TRI should evaluate reporting thresholds, supplier notification requirements, possible reporting exemptions (if applicable), de minimis levels, and claims of protection from disclosure, determining their TRI requirements and appropriate actions. TRI reporting forms for the 2020 calendar year are due to EPA by July 1, 2021.

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EPA Issues No Action Assurance Memo for New Industrial Stormwater Discharges

There is no available permit coverage from EPA for facilities that discharge stormwater associated with industrial activity in locations where EPA is the permitting authority. The 2015 Multi-Sector General Permit (MSGP) expired on June 4, 2020, and the renewed permit is undergoing response to comments prior to reissuance. EPA acknowledges that this poses an undue hardship on industrial facilities that would be required to obtain an individual wastewater discharge permit for stormwater runoff in the absence of an available MSGP. Therefore, EPA issued a "No Action Assurance" memorandum on June 3, 2020 extending "enforcement discretion" to allow new facilities (i.e., those that began after June 4, 2020 and before the renewed permit is issued) to begin discharging stormwater without a permit. Operators must comply with all provisions of the 2015 MSGP, except submittal of the Notice of Intent (NOI). At such time as EPA issues the renewed MSGP, operators have no more than 120 days to comply with the new permit and submit a NOI.

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FERC Issues Order Limiting Authorizations

On June 9, the Federal Energy Regulatory Commission (FERC) issued Order No. 871, "Limiting Authorizations to Proceed with Construction Activities Pending Rehearing." The Order constitutes a revision to the FERC regulations and precludes issuance of an authorization to proceed with construction of an approved natural gas project until the Commission acts upon

the merits of any request for rehearing, even if the project has received all other certifications and permissions to start construction. These changes follow a pledge made by Chairman Neil Chatterjee to act on landowner-related hearing requests within 30 days to reduce the use of tolling orders in such cases. The Order is one of several initiatives by the Commission to increase public transparency.

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American Burying Beetle Downlisting Delayed

Last spring, the U.S. Fish and Wildlife Service (USFWS) proposed to reclassify the American burying beetle (ABB) from federally endangered to federally threatened. The USFWS determined that the ABB is not currently at risk of extinction, and therefore does not meet the definition of endangered under the Endangered Species Act. In a recent court ruling, *Center for Biological Diversity v. Everson*, part of the USFWS Significant Portion of its Range (SPR) policy was vacated. As a result, the USFWS will need to re-assess its SPR analysis in the ABB downlisting proposal, which will delay the final determination until later this summer. Until then, ABB protections are unchanged although new rules proposed along with the reclassification could change regulatory requirements for projects.

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U.S. Supreme Court Creates New Clean Water Act "Functional Equivalent" Test

On April 23, the Supreme Court opinion in the *County of Maui v. Hawaii Wildlife Fund* offered a new boundary on the reach of the Clean Water Act (CWA), leaving the lower courts and EPA to interpret the justices' "functional equivalent" test. The CWA prohibits the addition of any pollutant from a "point source" to "navigable waters" without the appropriate permit from the EPA. The test was developed by the Supreme Court to help decide whether a permit is needed and weighs several factors, although not all factors may be applicable in each circumstance. The Court conceded that its test is nebulous and would require significant evaluation to determine if a discharge through groundwater is the functional equivalent of a direct discharge.

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EPA Finalizes Miscellaneous Organic NESHAP (MON) Amendments

On May 29, EPA finalized Risk & Technology Review amendments for the Miscellaneous Organic NESHAP (MON) standards. Key revisions to the MON include removal of startup, shutdown and malfunction exemptions, expansion of flare requirements and revision of heat exchange system monitoring. Additionally, equipment defined as "in Ethylene Oxide service" will be subject to more stringent equipment control requirements.

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EPA Releases Updated Regional Screening Level Tables

On May 21, EPA released updates to the Regional Screening Levels (RSLs) Generic Tables. The RSLs are developed by EPA to be used as guidance for cleanup of Superfund sites to promote constancy nationwide. These risk-based screening levels are also often used during Phase II Environmental Site Assessments to determine if detections of contaminates warrant further investigation. The RSLs include exposure levels for compounds of concern in soil, air, groundwater and tap water for residential and industrial scenarios. The RSLs have been updated to include changes to toxicity values, exposure parameters, chemical-specific parameters, equation formats and other screening level changes for select contaminates.

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STATE NEWS

Ohio EPA Plans to Study State's Largest Rivers

On June 16, Ohio EPA announced they are accepting public comments about the Agency's plan to study the state's largest rivers. This is the first year for the study and the results will become a baseline for future studies. The study will assess effects of various land uses, influences from discharges and spills and performance of permitted wastewater treatment plants. It will also include an evaluation of fish and macroinvertebrates, assessing whether the streams are meeting designated criteria for aquatic life and human recreation uses. The findings of the study will be presented as a Total Maximum Daily Load (TMDL) report with recommendations for actions to address any identified water quality issues in the studied rivers.

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Deadly Bat Fungus Found in Montana

In May, the fungus that causes white-nose syndrome in bats was identified for the first time in three Montana counties. White-nose syndrome is the primary cause of population declines of the federally-threatened northern long-eared bat (*Myotis septentrionalis*). Driven by concern over northern long-eared bat populations and the fungus, the USFWS has previously created a rule under Section 4d of the ESA to allow northern long-eared bat habitat removal when it occurs within the designated "white-nose zone." The white-nose zone includes all counties within 150 miles of a confirmed occurrence of the fungus. The new confirmed cases of the fungus in Montana will expand the white-nose zone farther west. For compliance under the ESA within the white-nose zone, all tree clearing must occur outside the northern long-eared bat pup season defined as June 1 to July 31.

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PADEP Unveils Enhanced Online Permitting Options

On June 22, the Pennsylvania Department of Environmental Protection (PADEP) announced and commenced use of a new online permit application tool called the OnBase-DEP Public Upload Form. The OnBase system allows for more efficient and less costly processing of permit applications for both applicants and the Department. Note that the OnBase system is not applicable to permits and authorizations for which the pre-existing ePermitting process is used, including certain oil and gas program and air quality program permits, and payments are still required to be mailed.

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TCEQ Releases Draft Air Quality Standard Permit for Marine Loading Operations

On June 1, the Texas Commission on Environmental Quality (TCEQ) released the draft Air Quality Standard Permit for Marine Loading for public review and comment. The new standard permit can authorize a limited number of facilities at a site that conducts marine loading operation activities including marine, truck, and rail loading, storage tanks, fugitives, maintenance, startup and shutdown, among others. The draft permit lists the control and monitoring requirements that must be met as well as a prescribed method for performing impacts reviews. After comments are reviewed, the TCEQ is expected to prepare the final version of the standard permit.

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Ohio EPA Finalizes Wetland and New Ephemeral Stream General Permit

On June 25, Ohio EPA finalized the General Permit for Category 1 and Category 2 isolated wetlands and ephemeral streams. The Navigable Waters Protection Rule, effective June 22, 2020, states that ephemeral streams are no longer federally regulated under the CWA. This state-level permit, a combination of an existing and new permit, outlines activities to fill or discharge of dredged material into ephemeral streams. Applicants will be required to submit a Pre-Activity Notice for projects that exceed 300 linear feet of cumulative fill or discharge into these resources.

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Proposed New Rules for Sand Mines in the San Jacinto River Watershed

On June 12 and 19, the Texas Aggregates and Concrete Association (TACA) and the Lake Houston Area Grassroots Flood Prevention Initiative (FPI) submitted separate petitions for rulemaking to the TCEQ in response to the regional need to improve flood storage and sediment capture during large storm events. TACA and FPI advocate for the establishment of new best management practices at commercial sand mines located within designated portions of the San Jacinto watershed below Lake Conroe and within Montgomery, Harris and Liberty counties. Although TACA and FPI provide very similar sample guidance documents in content and intent, one major variance is the FPI requirement for mines to maintain a "performance bond." The performance bond would theoretically cover costs associated with remediation of breaches in perimeter berms and beneficial reclamation following completion of mining.

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PADEP Proposes RACT Rule for Oil & Gas VOC Emissions Control

On May 23, Pennsylvania's Environmental Quality Board proposed to adopt the PADEP's proposed rulemaking regarding reasonably available control technology (RACT) requirements and emission limitations for existing oil and natural gas sources of volatile organic compound (VOC) emissions. The affected sources include storage vessels, natural gas-driven pneumatic controllers, natural gas-driven diaphragm pumps, reciprocating and centrifugal compressors and fugitive emissions components. The PADEP estimates that the rule will apply to approximately 89,320 unconventional and conventional oil and natural gas wells, 435 midstream compressor stations, 120 transmission compressor stations and 10 natural gas processing facilities. The level of VOC control in the rule compares favorably to the requirements of 40 CFR Part 60 Subpart OOOOa. In addition to the rule's emissions limitations, there are associated monitoring, recordkeeping and reporting requirements. The PADEP is expected to establish the RACT requirements by January 21, 2021.

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THC Accepts Changes to Intensive Terrestrial Surveys Guidelines

In April 2020, the Texas Historical Commission (THC) accepted proposed changes to the Council of Texas Archeologists Standards and Guidelines for Intensive Terrestrial Surveys. These changes, in brief, include increased level of effort on non-linear surveys and an emphasis and codification of deep prospection application/procedures, which will increase scope, schedule and budget of projects involving deep impacts (over three feet) and any element of the Antiquities Code of Texas and/or Section 106 of the National Historic Preservation Act.

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Nationwide Permit 12: What Happened, Where It Stands, and What Happens Next?

Elyse H. Akhbari | Bricker & Eckler, LLP

On April 15, 2020, the United States District Court for the District of Montana issued an order with potentially broad-sweeping implications for energy-related projects across the country. The case, *Northern Plains Resource Council, et al. v. United States Army Corps of Engineers, et al.*, created uncertainty for projects that rely on the United States Army Corps of Engineers' (the Corps) Nationwide Permit 12 (NWP-12) authorization to complete projects in an efficient and timely manner.

Regulatory Background

NWP-12 is a widely used general permit under the Clean Water Act (CWA) that authorizes discharges of dredged or fill material into jurisdictional waters as required for the construction, maintenance, repair and removal of utility lines and associated facilities, including oil and gas pipelines.

NWP-12, like all nationwide permits, is subject to General Conditions set forth in federal regulations. General Condition 18 prohibits the use of any nationwide permit for activities that are likely to jeopardize threatened or endangered species under the Endangered Species Act (ESA) or destroy or adversely modify designated critical habitat for such species.

Section 7(a)(2) of the ESA requires the Corps to determine "at the earliest possible time" whether any action it takes "may affect" listed endangered species and/or critical habitat. If so, then the Corps is required to consult with the U.S. Fish and Wildlife Service (USFWS) and/or the National Marine Fisheries Service (NMFS).

Every five years, the Corps reissues its nationwide permits with various changes. In the 2017 reissuance, the Corps determined that the reissuance of NWP-12 would not affect listed species or critical habitat and therefore did not consult with the USFWS or the NMFS.

The *Northern Plains* Case

In Northern Plains, Plaintiffs challenged the Corps' authorization of NWP-12 in connection with the Keystone XL Pipeline. Plaintiffs claimed that the Corps' 2017 reissuance of NWP-12 violated the ESA, due to its failure to undertake the typical consultation process with the USFWS and NMFS.

The District Court agreed. The Court thus vacated NWP-12, enjoining the Corps from authorizing any dredge or fill activities under NWP-12 pending the completion of the ESA consultation process. The ruling was not limited to pipelines—putting into jeopardy other industries' reliance on NWP-12.

The Aftermath

After the District Court's ruling, the Corps and TC Energy (the Permit applicant) filed motions for a partial stay with the District Court. Plaintiffs opposed the stay and suggested instead that the vacatur and the associated injunction apply only to the construction of new oil and gas pipelines.

Again, the Court agreed. On May 11, 2020, the Court issued an amended order narrowing the scope of its earlier vacatur and injunction to "the construction of new oil and gas pipelines" while allowing other projects governed by NWP-12 to proceed.

After a denied appeal to the U.S. Ninth Circuit Court of Appeals, the Corps filed an application to the U.S. Supreme Court (Supreme Court) on June 15, 2020, seeking a stay of the May 11 order. The Corps requested that the stay be issued pending consideration and disposition of the appeal to the Ninth Circuit, as well as pending any further proceedings that would be filed in the Supreme Court. The Corps argued that the trial court's order should not survive appellate review, one being the order lacks any sound basis in the ESA, and absent a stay pending appeal, the Corps and the public would face irreparable harm.

On July 6, 2020, the Supreme Court order, authored by Justice Kagan, stayed the lower court's order, except as it applies to the Keystone XL pipeline. The Supreme Court ruled that the stay is to remain in place until the disposition of the appeal still pending before the Ninth Circuit Court of Appeals, and/or any future relief sought or granted by the Supreme Court.

What to Watch Out for Next?

For the time being, the July 6 decision means that the Montana District Court holding is limited *only* to the Keystone XL pipeline, while the Ninth Circuit appeal is pending. As a result, NWP-12 can technically be reinstated for use by other pipeline developers. However, the Supreme Court wrote that if a future petition for a writ of certiorari (e.g., petition for Supreme Court appeal) is denied for the Keystone XL pipeline (following a decision on the merits by the Ninth Circuit), the stay would terminate.

Due to the interim nature of the decision by the Supreme Court, the regulated community should remain attentive to developments in this case and announcements from the Corps regarding their intention to begin processing NWP-12 again.

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chemicals will require significant time and effort, and "final" actions for some issues may require years, regulatory drivers are moving forward and PFAS regulation will affect many areas and business practices.

For example, EPA notified Toxic Release Inventory reporters that facilities must begin tracking and collecting data on a list of 172 PFAS chemicals during 2020.

Several states have added specific language to their National Pollutant Discharge Elimination System (NPDES) permitting requirements to address PFAS. Should the regulatory changes concerning PFAS reach the federal or state level, it could affect construction and industrial NPDES permits as well as municipal separate storm sewer systems.

Earlier this year, a major piece of legislation, House Bill 535, was passed by the U.S. House of Representatives. Although now stalled in the Senate, the provisions of this bill touch on many environmental issues centered around PFAS.

These compounds are currently not considered hazardous substances under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA); however, if this bill becomes law, PFOA and PFOS would be designated as hazardous substances.

Designation of these chemicals as CERCLA hazardous substances would affect due diligence investigations conducted under the ASTM standards for property transactions, resulting in potential CERCLA liability and other regulatory issues.

Staying in Compliance

PFAS regulation is a complex and ever-evolving area. EPA continues to implement their PFAS Action Plan and individual states continue to develop unique target levels and guidance. It is prudent to continually monitor the regulatory updates at both the federal and state levels to understand how PFAS regulations may affect your industry and ensure continuing compliance with appropriate laws.

So, now you know why melted cheese doesn't stick to a food wrapper, and just how sticky the subject of PFAS can be.