

MANKO | GOLD | KATCHER | FOX LLP

AN ENVIRONMENTAL AND ENERGY LAW PRACTICE

2024 Environmental and Energy Law Forecast

PENNSYLVANIA

PADEP Expected to Finalize New Environmental Justice Policy in Early 2024

Jessica D. Hunt and Technical Consultant Will Hitchcock

On September 16, 2023, PADEP published its [Interim-Final Environmental Justice Policy](#) (the EJ Policy) in the Pennsylvania Bulletin and released an update to its environmental justice mapping tool ([PennEnviroScreen](#)). The EJ Policy expands upon prior versions of the policy to direct PADEP to consider and incorporate environmental justice principles in various aspects of its decision-making process. For permittees, the EJ Policy establishes enhanced public participation procedures for certain projects that are located or proposed to be located in or within 0.5 mile of an environmental justice area. Unlike prior iterations of the policy, PADEP will determine whether an area constitutes an environmental justice area based on a weighted index of both environmental indicators and population characteristics. For more information on the EJ Policy, please refer to [our article](#) summarizing the interim policy that was published in September 2023. PADEP is currently evaluating public comments received during the public comment period, which closed on November 30, 2023 and expects to finalize the EJ Policy in early 2024. Although it is not yet final, PADEP is currently implementing the EJ Policy. Applicants should be prepared to answer questions posed by PADEP regarding EJ Policy-applicability in their permit applications.

Pennsylvania PFAS Regulatory Changes Anticipated with EPA's Final PFAS MCLs on the Horizon

Bryan P. Franey, Esq., Jessica D. Hunt, Esq. and Giselle F. Davidian, Esq.

On January 14, 2023, the Pennsylvania Department of Environmental Protection (PADEP) established drinking water standards for perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS). Specifically, DEP established a Maximum Contaminant Level (MCLs) and Maximum Contaminant Level Goals (MCLGs) for PFOS at 18 parts per trillion (ppt) and 14 ppt, respectively, and 14 ppt and 8 ppt, respectively, for PFOA (collectively the Pennsylvania MCLs). Public water systems serving more than 350 persons and bottled, vended, retail, and bulk systems are required to begin conducting initial quarterly monitoring to demonstrate compliance with the Pennsylvania MCLs beginning January 1, 2024. Initial monitoring for public water systems serving less than 350 persons will not begin until January 1, 2025. Shortly after DEP finalized its PFAS MCLs, in March 2023, the United States Environmental Protection Agency (EPA) proposed national primary drinking water standards of 4 ppt for PFOA and PFOS, and a hazard index for a combination of perfluorononanoic acid (PFNA), perfluorohexane sulfonate (PFHxS), perfluorobutane sulfonate (PFBS), and hexafluoropropylene oxide (HFPO) dimer acid and its ammonium salt (GenX) (collectively the federal MCLs). The federal MCLs, once effective, will automatically become

Pennsylvania's drinking water standards. Thus, it is possible that public water systems that installed treatment to comply with Pennsylvania's MCLs, may need to install additional treatment to meet the federal MCLs if the federal MCLs are more stringent than the Pennsylvania MCLs. Click [here](#) for more information regarding the federal MCLs.

The federal MCLs will also impact soil and groundwater cleanup standards under Pennsylvania's Act 2 Program. Currently, Pennsylvania has groundwater and soil medium specific concentrations for PFOA, PFOS, and PFBS, as follows:

PFOA

- Soil: 4.4 mg/kg (residential), 64 mg/kg (nonresidential)
- Groundwater: 14 ppt

PFOS, and

- Soil: 4.4 mg/kg (residential), 64 mg/kg (nonresidential)
- Groundwater: 18 ppt

PFBS

- Soil: 66 mg/kg (residential), 960 mg/kg (nonresidential)
- Groundwater: 1,000 ppt (residential), 2,900 ppt (nonresidential)

The PFOA and PFOS MSCs are based on the Pennsylvania MCLs. Once the federal MCLs are finalized and effective, the federal MCLs will automatically become the de facto groundwater MSCs under Act 2. Separately, DEP will need to promulgate through rulemaking new or revised residential and nonresidential MSCs for soil based on the federal MCLs.

Act 2 Changes Anticipated in 2024

Jonathan H. Spergel, Esq. and Technical Consultant Will Hitchcock

PADEP is currently working on substantial updates to the Land Recycling Program (Act 2) Technical Guidance Manual, which was last updated in 2019. While many of the updates are intended to provide greater clarity and consistency across Pennsylvania, there are also some substantive policy issues at play, including: (i) the regulated substances for which a remediator may receive liability relief under Act 2; (ii) the types of properties that are considered to be residential vs. non-residential; and (iii) the ability to round sampling results when comparing against Act 2 cleanup standards. Additional proposed updates and changes to the Technical Guidance Manual are expected this year and will likely require several rounds of review and revision before an updated document can be finalized.

A number of changes to the numeric cleanup standards for certain regulated substances have also been proposed by PADEP and may become effective in 2024 if and when they are approved by the Pennsylvania Environmental Quality Board. These proposed changes include: (i) a significant reduction in the residential soil standard for lead from 500 to 200 mg/kg (based on updated biokinetic models for lead exposures to children); (ii) slight changes to the cleanup standards for several Polynuclear Aromatic

Hydrocarbons (PAHs); and (iii) significant reductions to the soil standards for cadmium due to updated toxicity information.

Tax or Fee? – The Fate of PA Stormwater Charges to be Decided in 2024

Diana A. Silva, Esq., Danielle N. Bagwell, Esq., and Technical Consultant Michael C. Nines, P.E., LEED AP

Last year, the Pennsylvania Commonwealth Court held that a stormwater charge from the Borough of West Chester was not a fee for service, but rather an unauthorized local tax in *Borough of West Chester v. Pa. State System of Higher Education and West Chester University of Pa. of the State System of Higher Education*, 291 A.3d 455 (Pa. Cmwlth. 2023). We reported on this decision in [MGKF's 2023 Environmental Forecast](#), and noted that the case would likely be winding its way through the appellate process in 2023.

In early 2023, the Borough promptly appealed the decision to the Pennsylvania Supreme Court, and was joined by several amici curiae, which included municipalities, municipal advocacy organizations, and non-profit environmental groups. Briefs from the Borough and their aligned amici filed in mid-July 2023 argue that the Commonwealth Court's decision was incorrect and should be overturned, because the stormwater fee charged to the University reflected a fee for service rather than a tax, and that the charge was properly established based on impervious surface coverage. The Borough and other proponents of the stormwater charge argue that all properties within a locality benefit from municipal stormwater services and infrastructure, even if the property is not connected to or serviced by that infrastructure. They point to generalized improvements to overall water quality and an alleged "comprehensive" method of managing stormwater and reducing flooding within a locality as among the bases to support a universal stormwater charge. The Borough and several amici argue that if the Commonwealth Court's decision finding stormwater charges to be a tax, rather than a fee, were allowed to stand, local municipalities and authorities will be deprived of a designated funding source for the costs necessary to comply with state and federal laws and regulations involving stormwater.

On the other side of the argument are the Pennsylvania State System of Higher Education and West Chester University, represented by the Pennsylvania Attorney General, and aligned amici, who filed their briefs in mid-October 2023. They argue that the stormwater fee is a classic tax or assessment because the Borough could not show that the university received a concrete, direct, or discrete benefit that can be traced to the stormwater charges. In fact, the only evidence the Borough presented was that monies collected were used to promote generalized benefits of improved stormwater and reduced flooding, benefits that are shared equally by every property owner and resident within a locality. The university and aligned amici also argued that even if the stormwater charge was not declared a tax and considered a fee, the charges imposed were nevertheless inappropriate and illegal because the high value of the charges was not "reasonably proportional" to any benefits provided by the Borough from their stormwater infrastructure systems. They argue that the Borough failed to analyze or consider the actual expected costs of maintaining or operating any portion of the stormwater infrastructure system that is associated with any particular property, including any of the university's properties in the Borough. The university and aligned amici also pointed to the fact that before the Borough's enactment of the stormwater charge, funds for stormwater projects were paid from the Borough's general fund, supplied by local tax dollars.

The fate of stormwater charges in the Commonwealth of Pennsylvania will be decided in 2024, as oral argument and a decision from the Pennsylvania Supreme Court is expected this year. The resolution of the *Borough of West Chester* case will have far-reaching implications on how local municipalities and authorities will fund stormwater projects, maintenance, and operations in the future.

Pennsylvania's Climate Change Initiatives Entering 2024

Thomas M. Duncan, Esq. and Technical Consultant Michael C. Nines, P.E., LEED AP

Regional Greenhouse Gas Initiative

On November 1, 2023, the Pennsylvania Commonwealth Court, ruling on cross-applications for summary relief, issued a 4-1 decision striking down Pennsylvania's rulemaking titled "CO₂ Budget Trading Program," which would have allowed Pennsylvania to join the Regional Greenhouse Gas Initiative (RGGI). The decision follows on the Commonwealth Court's prior injunction of the RGGI rulemaking in 2022.

RGGI is an intergovernmental organization consisting of ten member-states (CT, DE, ME, MD, MA, NH, NJ, NY, RI, VT) that has established a market-based cap-and-trade program for CO₂ emissions from fossil fuel-fired power plants that have 25 megawatts or more of nameplate capacity and send at least 10 percent of their gross generation to the grid. The rulemaking would aim to reduce CO₂ emissions from RGGI sources by 25.5 percent by 2030. Based on an analysis conducted by a consultant retained by the Pennsylvania Department of Environmental Protection (PADEP), most emission reductions are expected to come from reductions in coal use, while a smaller percentage would come from natural gas. Pennsylvania itself would expect to see a total statewide emissions reduction of 183 million tons of CO₂ by 2030, but approximately 96 million of that 183 million tons of CO₂ emissions would be shifted (i.e., leaked) to other states within PJM territory. PJM is a regional transmission organization that coordinates the movement of electricity in Pennsylvania, all or parts of 12 other states, and the District of Columbia. Specific to natural gas, nearly all the anticipated reductions in natural gas emissions and generation in Pennsylvania are expected to be leaked to other PJM states.

PADEP expects the auctions of RGGI credits to yield hundreds of millions of dollars in revenues through 2030. The Air Pollution Control Act requires that all auction proceeds be directed to the Clean Air Fund "for the use in the elimination of air pollution," and PADEP would intend to develop a reinvestment plan for the auction revenues including reinvestment in energy efficiency, renewable energy, and greenhouse gas abatement. PADEP has taken the position that the allowances amount to fees that are authorized under the Air Pollution Control Act. The Commonwealth Court in its recent decision, however, disagreed, finding that the RGGI auction proceeds would be "grossly disproportionate" to the costs of overseeing participation in the RGGI program or PADEP's annual regulatory needs and also related to activities beyond PADEP's regulatory authority.

The Commonwealth has appealed to the Pennsylvania Supreme Court, and a final decision on the RGGI rulemaking could come in 2024. The Governor's office issued a statement explaining that its decision to appeal was due to implications of important executive authority. The Governor's office also explained that the Governor is willing to "sign legislation replacing RGGI with a Pennsylvania-based or PJM-wide cap-and-invest program."

Act 70 of 2008

The Pennsylvania Climate Change Act, Act 70 of 2008, required PADEP to prepare a Climate Change Impacts Assessment and a Climate Change Action Plan and requires PADEP to update these documents once every three years. The last updates were issued in May 2021 and September 2021. PADEP is expected to issue the next updates in 2024. The Climate Change Impacts Assessment summarizes scientific projections of temperature and precipitation changes, discusses the potential impacts of climate change, and evaluates economic opportunities created by the potential need for alternative sources of

energy and technologies. The Climate Change Action Plan lays out a course for reaching Pennsylvania's greenhouse gas reduction goals, which are currently a 26 percent reduction by 2025 and an 80 percent reduction by 2050, from 2005 levels.

Please feel free to forward this information to your colleagues and encourage them to subscribe to our mailing list.

This alert is intended as information for clients and other interested parties. It is not intended as legal advice. Readers should not act upon the information contained herein without individual legal counsel.

Portions of this email may contain attorney advertising under the rules of some states.

Copyright © 2024. Manko, Gold, Katcher & Fox, LLP www.mankogold.com