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Manko, Gold, Katcher & Fox, LLP, an environmental and energy law practice, regularly publishes our *Client Alert* newsletter to help our clients and friends stay on top of environmental issues that may affect their businesses. *Client Alert* focuses on hot regulatory issues, recent court and agency decisions, current environmental legislation and technical information.

Air

EPA to Reconsider North Carolina Petition to Curb Air Pollution from Upwind States

by KATE VACCARO

On March 5, 2009, the United States Court of Appeals for the District of Columbia Circuit granted a request by the U.S. Environmental Protection Agency ("EPA") to remand EPA's 2006 decision denying North Carolina's petition to reduce air pollution from certain upwind states, including Pennsylvania and Ohio, among others. According to Section 126 of the Clean Air Act ("CAA"), states and other entities may petition EPA if they believe pollution from upwind states will prevent them from meeting air quality standards. If EPA approves the petition, EPA may impose stricter pollution control requirements on sources in the upwind states.

EPA initially denied North Carolina's petition, reasoning that the Clean Air Interstate Rule ("CAIR"), which EPA intended to curb nitrogen oxide ("NOx") and sulfur dioxide ("SO2") emissions that contribute significantly to nonattainment of the National Ambient Air Quality Standards for PM2.5 and 8-hour ozone in downwind areas, would provide the same protections as granting North Carolina's petition. However, after the D.C. Circuit concluded, in June 2008, that CAIR is inconsistent with the CAA and remanded the regulation to EPA, North Carolina took steps to have EPA to reconsider its petition. EPA requested that the D.C. Circuit remand North Carolina's petition for reconsideration as a result of the Court's remand of CAIR.

EPA Announces Air Toxics Monitoring Near Schools

by MICHAEL NINES

On March 31, 2009, the U.S. Environmental Protection Agency ("EPA") released a list of priority schools for air quality monitoring as part of an initiative to understand whether outdoor toxic air pollution poses health concerns to schoolchildren. Initial monitoring will take place at 62 schools in 22 states. EPA selected the schools using a number of factors, including results from a

computer modeling analysis, a recent newspaper series on air toxics at schools, and consultation with state and local agencies responsible for air quality. EPA is following an aggressive timeline to begin sampling air outside the schools, focusing on some schools near large industries and some schools in urban areas, where emissions of air toxics come from a mix of large and small industries, cars, trucks, buses, and other sources.

Schools included in the monitoring program in our region are Paulsboro High School (Paulsboro, NJ), Riverside Elementary Middle School (Reading, PA), and Kreutz Creek Valley Elementary (Hallam, PA). Air toxics to be monitored include hexavalent chromium (Cr+6), volatile organic compounds (VOCs), carbonyls, and metals in particulate matter (PM-10). Monitoring at the schools will be phased in over the next three months. Monitors placed at each school will sample air quality on 10 different days during a 60 day time period to generate a snapshot of any toxics present in the outdoor air. EPA is asking state and local agencies to install and operate the monitors.

Once the air toxics data for a school are quality-assured, EPA will analyze the results to estimate how exposure to the outdoor air around the school might affect health over the long-term. Results from the monitoring will be made available to the public through EPA's website.

EPA Proposes to Delay Effective Date for New Source Review Aggregation Rule

by CAROL McCABE

In February, the U.S. Environmental Protection Agency ("EPA") published a stay of its New Source Review "aggregation rule" which was published as a final rule on January 15, 2009. The rulemaking was intended to clarify EPA's existing regulations governing the circumstances under which it may be appropriate in New Source Review permit applications to aggregate emissions increases associated with plant modification projects. The stay is intended to allow EPA's new leadership to evaluate the rulemaking, and to address issues raised on petition for reconsideration by the Natural Resources Defense Council. Although the rule was stayed for ninety days, until May 18, 2009, EPA has proposed an additional six-month delay of the rule's effective date, until November 18, 2009.

EPA Proposes Standards for Internal Combustion Engines

by CAROL McCABE and MICHAEL NINES

On March 5, 2009, the U.S. Environmental Protection Agency ("EPA") published proposed rules that would affect a broad category of existing internal combustion engines, including emergency generators. EPA estimates that more than one million engines will be affected. The rule is proposed as an amendment to 40 CFR Part 63, Subpart ZZZZ, National Emission Standards for Hazardous Air Pollutants for Reciprocating Internal combustion Engines, and would affect all existing engines at area (non-major) sources of hazardous air pollutants ("HAPs"), as well as existing engines located at major sources of HAPs.

EPA proposes to limit emissions of HAP through emission standards for carbon monoxide ("CO") for most diesel-fired internal combustion engines. EPA anticipates that the control technologies necessary to meet these standards will also result in reductions of nitrogen oxides ("NOx") and particulate matter emissions. EPA also proposes to require that use of ultra-low sulfur diesel fuel for diesel-fired compression ignition engines greater than 300 horsepower with a displacement less than 30 liters per cylinder.

The proposal covers a wide variety of engine types, and identifies specific emission limits or work practice standards for engine categories. For example, at major sources of HAP, all compression ignition engines with a rating between 50 and 300 horsepower would be subject to a CO emission standard of 40 ppmvd, including during periods of startup or malfunction. At area HAP sources, these engines would be subject to specific work practice, inspection and maintenance standards. Engines with a rating greater than 300 horsepower, at both area and major HAP facilities, would be subject to a CO emission standard of 4 ppmvd or 90 percent reduction, with a 40 ppmvd standard during startup or malfunction. Emergency compression ignition engines with a rating between 300 and 500 horsepower located at major HAP sources would be subject to a 40 ppmvd standard for CO. Likewise, emergency compression ignition engines with a rating greater than 500 horsepower located at area HAP sources would be subject to a 40 ppmvd standard for CO, including during startup and shutdown. Smaller emergency engines would be subject to specific work practice, inspection and maintenance standards.

A primary goal of the proposed rule is to achieve significant reductions from large, existing engines at area HAP sources that were not previously subject to federal emission standards. EPA anticipates that add-on controls may be necessary to achieve the proposed emission limits. Such controls may include non-selective catalytic reduction, oxidation catalyst or diesel particulate filters. In addition, the proposed rule includes performance testing requirements for all engines subject to emission limits.

The proposed amendment to Subpart ZZZZ is potentially significant for many owners and operators of internal combustion engines. Particularly affected will be large emergency and non-emergency engines, such as those serving hospitals, data centers, industrial plants or other facilities which rely on these engines. These facilities should carefully evaluate the proposed rules, and determine the feasibility of meeting the proposed emission limits. EPA is accepting comment on the proposal until June 3, 2009.

Boiler MACT Update: PADEP to Implement "MACT Hammer" for Industrial, Commercial and Institutional Boilers and Process Heaters

by KATE VACCARO

On June 8, 2007, the United States Court of Appeals for the District of Columbia Circuit vacated the National Emission Standards for Hazardous Air Pollutants for Industrial, Commercial and Institutional Boilers and Process Heaters, 40 CFR Part 63, Subpart DDDDD ("Boiler MACT"), and remanded the rule to the U.S. Environmental Protection Agency ("EPA"). The Boiler MACT,

which set a September 13, 2007 compliance deadline for existing sources, established hydrogen chloride, particulate matter, mercury, and carbon monoxide emission limits for various new and existing affected units located at major sources of hazardous air pollutants ("HAPs"). EPA has not yet promulgated a revised version of the Boiler MACT.

Section 112(j) of the Clean Air Act, also known as the "MACT Hammer," establishes a mechanism for states and local agencies to regulate emissions of HAPs, through the development of source-specific MACT standards, in the event EPA fails to promulgate MACT standards for regulated source categories by the applicable deadlines. This mechanism is implemented through the submission by affected facilities of two separate permit applications: a Part 1 MACT application, which is a simple notification providing basic information about the affected source, and a Part 2 MACT application, which requires more detailed, comprehensive source-specific information. The permitting authority has up to 18 months after the submittal of a complete Part 2 application to develop specific MACT standards for the affected source and incorporate such standards into the source's Title V permit.

The Pennsylvania Department of Environmental Protection ("PADEP") previously stated that it, like many other state agencies, intended to delay implementation of the MACT Hammer for Boiler MACT sources until EPA releases guidance for developing standards for this source category. However, a representative from PADEP recently made an informal announcement that PADEP plans to begin implementation of the MACT Hammer for Boiler MACT sources shortly. Part 1 applications will be due within 30 days following notification by PADEP. Part 2 applications will be due within 60 days following the Part 1 application deadline. Although PADEP has not yet issued a formal notification addressing the submission of Part 1 applications, we are continuing to track available information on this issue. Separately, EPA has reported that it will propose a revised Boiler MACT by August 2009; however, it is presently unclear how this rulemaking process will affect PADEP's current plan to initiate implementation of the MACT Hammer for Boiler MACT sources.

EPA Issues Proposed "Endangerment Finding" for GHGs

Also under ENERGY and SUSTAINABILITY

by TODD KANTORCZYK

On April 24, 2009, the U.S. Environmental Protection Agency ("EPA") published a proposed “endangerment finding” for six greenhouse gases ("GHGs") pursuant to Section 202(a) of the Clean Air Act ("CAA"). The proposed finding sets the stage for EPA regulation of GHGs not only under Title II of the CAA, which concerns mobile sources, but also under Title I and other sections of the CAA applicable to stationary sources. The proposed endangerment finding does not impose any regulations, and it is unclear if and when EPA intends to issue additional GHG regulation based on the endangerment finding. The finding, however, sends a clear signal that EPA believes it possesses the authority to regulate GHGs under the current provisions of the CAA and that it is prepared to do so in the absence of any Congressional action or climate change legislation in the near term. Whether the proposed endangerment finding results in pushing Congress towards passing climate change legislation, or results in EPA in fact exercising its regulatory authority to address climate change issues is something that will likely unfold over the rest of 2009.

The EPA's proposed endangerment finding is the agency's response to the U.S. Supreme Court's 2007 landmark decision in *Massachusetts v. EPA*. In that case, the Supreme Court remanded EPA's denial of a petition by nineteen environmental and renewable energy industry organizations arguing that EPA was required to regulate GHGs under Section 202(a) of the CAA because they are air pollutants that are reasonably anticipated to endanger public health or welfare. In its initial denial of the petition in 2003, EPA concluded that GHGs did not constitute "air pollutants" under the CAA and thus EPA lacked authority to regulate GHGs. EPA also argued that even if it possessed authority to regulate GHGs, it was not inclined to do so for various policy reasons. The Supreme Court disagreed with EPA on both counts, holding that GHGs were air pollutants under the CAA, and that EPA's alternative reasons for not regulating GHGs were not sufficiently grounded in the provisions of Section 202(a), i.e., they did not relate to a determination as to whether GHGs "may reasonably be anticipated to endanger public health or welfare."

Despite the Supreme Court's remand, the EPA under the Bush Administration did not take any specific action to respond to the decision until the end of July 2008, when it issued a lengthy Advance Notice of Proposed Rulemaking ("ANPR") that sought comment on the potential regulation of GHGs under the CAA. The ANPR was controversial in that prior versions supposedly contained conclusions supporting regulation of GHGs under the CAA, but the published version included statements from the EPA administrator and other agency heads outlining their reasons as to why regulation of GHGs under the CAA would be unworkable.

The proposed endangerment finding issued by the Obama administration's EPA Administrator, Lisa Jackson, represents a reversal of the Bush administration's view of EPA's regulatory authority under the CAA with respect to GHGs. The proposed finding methodically proceeds through the legal framework and current scientific evidence associated with the regulation of GHGs under Section 202(a) and ultimately concludes that the six key GHGs—carbon dioxide ("CO2"), methane ("CH4"), nitrous oxide ("N2O"), hydrofluorocarbons ("HFCs"), perfluorocarbons ("PFCs"), and sulfur hexafluoride ("SF6")—meet the standard for regulation under Section 202(a), in that emission of these GHGs are reasonably anticipated to pose a danger to public health and welfare as a result of their impact on climate change.

While the proposed endangerment finding specifically concerns the regulation of mobile sources under Title II of the CAA, a final endangerment finding could affect the regulation of GHGs emitted by stationary sources because the "endangerment" standards triggering action under those stationary source programs are very similar if not identical to the analogous mobile source standards. Thus, this endangerment finding could result in EPA action on GHGs under the National Ambient Air Quality Standards ("NAAQS") framework, the Prevention of Significant Deterioration ("PSD") programs, or the New Source Performance Standards ("NSPS") regulations.

Nevertheless, based on statements by Administrator Jackson and others indicating a preference for comprehensive climate change legislation passed by Congress over new CAA regulations promulgated by EPA, it is unclear whether EPA is, in fact, poised to begin regulating GHGs from a variety of sources. Indeed, it is widely speculated that this endangerment finding is intended to ratchet up the pressure on Congress to pass climate change legislation by raising the prospect of EPA regulation under the current CAA framework in the absence of new legislation.

Whether this pressure will, in fact, result in new legislation from Congress, or whether it will result in increased pressure upon EPA to devise its own regulatory programs for GHGs under the CAA will likely play out over the rest of 2009. It also remains to be seen how this potential federal involvement in the regulation of GHG emissions will affect the many regional, state and local programs, such as the Regional Greenhouse Gas Initiative ("RGGI"), Pennsylvania's Act 70, or New Jersey's Global Warming Response Act, all of which were developed at a time when the federal government was on the sidelines with respect to GHG regulation.

EPA Opens Comment Period for GHG Reporting Rule

Also under ENERGY and SUSTAINABILITY

by TODD KANTORCZYK

On April 10, 2009, the U.S. Environmental Protection Agency ("EPA") published a proposed rule that would require mandatory monitoring and annual reporting of greenhouse gas ("GHG") emissions by stationary sources that emit 25,000 metric tons of GHGs (measured as CO2 equivalents or "CO2e") in any year starting in 2010. The proposed rule also requires annual reporting by fossil fuel suppliers and engine manufacturers. The almost 300 page notice of proposed rulemaking contains detailed rules, and in many cases options, as to how sources are required to measure and report their annual GHG emissions. With the federal climate change legislation and EPA GHG regulations on the horizon, as well as ongoing state activity in the climate change area, any facility with sources that emit GHGs will want to pay close attention to this rule as it develops because the annual monitoring and reporting requirements have the potential to "lock in" sources for purposes of these GHG programs going forward. Comments on the proposed rule are due to EPA by June 9, 2009.

As a general matter, the GHG reporting rule, which is to be promulgated at 40 C.F.R. Part 98, requires annual reporting of GHG emissions by each facility that falls within one of the following three categories:

- Facilities that contain any specifically identified source categories, such as electric generating facilities subject to the Acid Rain program, aluminum production facilities and petroleum refineries, that EPA believes emit greater than 25,000 tons per year CO2e as part of normal operations;
- Facilities that emit 25,000 CO2e or more from stationary fuel combustion sources and any of a number of industry-specific sources in any calendar year starting in 2010. Such sources include cement production, food processing, glass production, iron and steel production and landfills; and
- Facilities that do not include one of the listed sources, but that include stationary fuel combustion sources with an aggregate maximum rated heat input capacity of 30 mmBTU/hour or greater and emit 25,000 tons per year of CO2e in any calendar year starting in 2010.

Importantly, the proposed rule excludes from the fuel combustion source category portable "emergency generators." However, the proposed definition of "emergency generator" contains provisions designed to ensure that the "emergency generator" is not used for non-emergency

uses. Specifically, the equipment must be designated as an "emergency generator" in a permit and must not serve as back-up power sources under conditions of load shedding, peak shaving, or power interruptions pursuant to an interruptible power service agreement. In addition, the proposed rule takes a "once in, always in" approach, meaning that if a facility exceeds the reporting thresholds in any calendar year starting in 2010, that facility is subject to the rule every year the rule remains in effect, even if the facility falls below the applicable thresholds in future years.

The proposed rule also raises a number of other issues related to the use of continuous emission monitoring devices ("CEMS"), GHG emission calculations (including the use of default emission factors and other values for specific industries), and the types of data other than GHG emissions that must be reported and maintained by affected facilities.

The activity in Congress on comprehensive climate change legislation and EPA's recently proposed "endangerment finding" for GHGs, which raises the prospect of EPA regulation of GHGs under the current provisions of the CAA, indicate that the likelihood of mandatory federal GHG regulation is higher than ever. At the same time, a number of states, including Pennsylvania and New Jersey, continue to consider mandatory GHG emission reduction rules. Facilities may be required to report GHG emissions under EPA's proposed reporting rule before any emission reduction rules come on line. Thus, a facility's options with respect to these potential GHG emission reduction programs may be constrained by how the facility has chosen to report its GHG emissions under the GHG reporting rule. Accordingly, facilities that are potentially subject to the EPA's proposed GHG reporting rule may wish to consider carefully its compliance options under the rule and whether it may be useful to submit comments to EPA before the June 9 deadline.

NJDEP Proposes Greenhouse Gas Monitoring and Reporting Program

Also under ENERGY and SUSTAINABILITY

by BRYAN FRANEY

On January 20, 2009, the New Jersey Department of Environmental Protection ("NJDEP") published a proposed rule that would require the monitoring and reporting of greenhouse gas emissions ("GHGs") by certain manufacturers and distributors of fossil fuels, gas public utilities, and other significant emitters of GHGs. The proposed rule was mandated by the Global Warming Response Act of 2007, which requires NJDEP to implement a program to reduce GHG emissions to 1990 levels by 2020 and to 80 percent less than 2006 levels by 2050.

The proposed reporting requirements would be implemented using three existing reporting mechanisms. First, the proposed rule would amend New Jersey's Air Pollution Control rules to require stationary sources that have the potential to emit certain threshold quantities of GHGs (other than carbon dioxide) to report those emissions on Emissions Statements. By way of example, the proposed reporting threshold for methane is 100 tons per year. NJDEP anticipates that this threshold will require Emission Statements from facilities not required to submit Emission Statements under existing rules such as landfills and wastewater treatment facilities. Similarly, the proposed thresholds for refrigerants will likely require Emission Statements from

facilities with refrigeration equipment such as chillers, retail food refrigeration and cold storage warehouses which may not be required to submit Emission Statements under existing rules.

Second, the proposed rule would require prime suppliers of fossil fuel, gas public utilities, and natural gas pipeline operators ("greenhouse gas survey reporters") to report their sales of fossil fuel as part of their Community Right-to-Know Survey ("CRTK") requirements. These entities are already subject to certain reporting requirements under the CRTK rules. NJDEP will use the sales information to calculate the quantities of GHGs released from that fuel.

Third, the proposed rule would require facilities that store hydrofluorocarbons, perfluororcarbons, sulfur hexafluoride, ethers and halogenated ethers in quantities equal to or greater than 50 pounds ("significant emitters of greenhouse gases") to report such storage on CRTK surveys. Like the "greenhouse gas survey reporters," such "significant emitters of greenhouse gases" are already subject to CRTK rules and may be subject to other substantive reporting requirements under those rules.

The proposed reporting requirements will be used by NJDEP to prepare biennial reports summarizing New Jersey's progress towards compliance with the 2020 and 2050 emission limits and to develop strategies, measures and recommendations for meeting the 2020 and 2050 limits. The 60-day comment period on the proposed reporting rule closed on March 21, 2009.

New Jersey Proposes Global Warming Solutions Fund Act Rules for Financial Assistance Programs

Also under ENERGY and SUSTAINABILITY

by BRUCE KATCHER

In the February 17, 2009 *New Jersey Register*, the New Jersey Department of Environmental Protection ("NJDEP") proposed new rules for the use of funds generated by the auction of Carbon Dioxide ("CO2") allowances under the Regional Greenhouse Gas Initiative ("RGGI") CO2 Budget Trading Program. RGGI requires large power generating facilities within its ten member northeast states to obtain allowances for their CO2 emissions through a periodic auction conducted by RGGI. New Jersey participates in the auction and receives proceeds from the sale of its allowances to the participating utilities.

In New Jersey, the proceeds of the auction sale are to be distributed by the Economic Development Authority ("EDA"), the Board of Public Utilities ("BPU"), and the NJDEP in accordance with the New Jersey Global Warming Solutions Fund Act. Under the Act, sixty percent of the proceeds are to go to EDA for grants and other financial assistance for commercial, industrial, and intuitional entities to support energy efficiency and new efficient, state of the art electric generation facilities. Twenty percent is to be used by the BPU to support programs designed to reduce electricity demand or costs to low and moderate income residential electricity customers. The remaining twenty percent goes to the NDJEP to distribute to (a) municipalities for greenhouse gas ("GHG") reduction efforts (ten percent), and (b) programs for enhancement of forests and tidal marshes to promote carbon sequestration (ten percent).

The proposed regulations establish a priority ranking system for use by EDA, BPU and NJDEP in allocating funds, set forth the criteria for NJDEP to use in determining if an electric generating facility is state of the art, and establish the polices and procedures for NJDEP to allocate funds through its Local Government Greenhouse Gas Reduction Program. For all eligible projects, priority points are assigned depending on the type of benefits from the project, with the net reduction in GHG emissions having the highest number of points by far. Other benefits assigned points include energy savings, carbon sequestration and, co-benefits (e.g., jobs, reducing other air pollutants). Factors such as whether a project has received other funding, how readily its results may be replicated, the expected production of useful data, a demonstrated readiness to proceed, and financial feasibility also are assigned points.

The regulations also provide for the application contents and agency evaluation process, the process for making grant awards and entering into grant agreements, reporting requirements to enable the agency to track progress, and grant conditions. The public comment period closed on April 18, 2009.

PA Climate Change Advisory Committee and PADEP Move Forward on Act 70 Work

Also under ENERGY and SUSTAINABILITY

by TODD KANTORCZYK
Over the past few months, the Pennsylvania Department of Environmental Protection ("PADEP") and the Climate Change Advisory Committee ("CCAC") have continued to make progress on the deliverables required by the Pennsylvania Climate Change Act ("Act 70"). For example, at its February 27, 2009 meeting, the CCAC approved the study of dozens of additional climate change "work plans" that suggest greenhouse gas reduction measures for many Pennsylvania businesses, including those in the energy, real estate development, transportation, waste, and agriculture industries. A more detailed list of the new work plans can be found at http://www.mgkflaw.com/specAlert2009/specAlert-2009-03-03.pdf.

The current schedule envisions that between now and the end of June, the appropriate CCAC subcommittees will evaluate each of these new work plans (plus the other work plans previously proposed by PADEP) with the help of Climate Change Strategies, a consultant hired by PADEP, and then make recommendations to the full CCAC. The full CCAC will then consider the work plans coming out of the subcommittees through the middle of July and make final work plan recommendations to PADEP. PADEP, in turn, will integrate these recommendations into the Climate Change Action Plan that PADEP is required to develop and submit to the General Assembly and the Governor under Act 70 by October 9, 2009.

The issue of public involvement in the development of the Climate Change Action Plan has been a point of discussion at every recent CCAC meeting. As currently conceived, there will be discrete opportunities for public involvement at the CCAC subcommittee level as part of the work plan evaluation process. Each of the subcommittees will be allowed to receive input from outside "experts" on the various work plans during their scheduled meetings and conference calls. These "experts" generally are members of the public that have been approved by PADEP and the CCAC subcommittee to participate in the subcommittee process as a result of

demonstrated interest and expertise in the subject area. Once the subcommittees' work is complete, however, the next official opportunity for substantive public comment on the Action Plan will be after PADEP submits the Action Plan to the General Assembly and the Governor. PADEP intends to collect the comments at that time and subsequently provide a response document to the General Assembly and the Governor.

Another requirement of Act 70 is for PADEP to produce by April 9, 2009, a report on the potential impacts and economic opportunities associated with climate change in the Commonwealth. PADEP previously hired a group at Penn State to produce this "Impacts Assessment" and a draft of the 300 plus page report was released for public comment on April 17, 2009. The document uses global climate models to assess impacts on specific areas outlined in Act 70, such as temperature and precipitation, human health, the economy and management of risk, forests, wildlife, fisheries, recreation, agriculture, tourism, and the opportunities resulting from alternative energy needs, carbon capture and sequestration technologies, and other climate-related technologies. The comment period for the report runs through May 18, 2009.

Emergency Planning & Response

Congressional Committees Work to Develop Chemical Security Bill Before Rules Expire

by BRETT SLENSKY
The Department of Homeland Security's ("DHS") final interim rules regulating security at high-risk chemical facilities (the Chemical Facilities Anti-Terrorism Standards regulation or "CFATS") expire September 30, 2009, and bills are in the works in both the House (in the Homeland Security and Energy and Commerce Committees) and Senate (in the Homeland Security and Government Affairs Committee) to extend the law.

Currently, CFATS requires high-risk chemical facilities to complete security vulnerability assessments, to develop site security plans and to implement protective measures as necessary to meet DHS-defined risk-based performance standards. Industry has expressed concern over the potential scope of the new legislation, particularly with respect to any new requirement that covered facilities consider the use of inherently safer technology or the use of safer processes or chemicals, and thirty-four industry organizations have asked Congress to reauthorize CFATS without making any changes to the law.

NJDEP Re-Adopts TCPA Program Rule with Amendments

by BRIDGET DORFMAN
On March 16, 2009, the New Jersey Department of Environmental Protection ("NJDEP") published a notice in the *New Jersey Register* in which it re-adopted, with amendments, the rules for the Toxic Catastrophe Prevention Act ("TCPA") program that were initially proposed on September 15, 2008. The TCPA requires facilities that handle extremely hazardous substances ("EHSs") in excess of certain threshold quantities to have an NJDEP-approved risk management

program, the goal being to prevent catastrophic accidents that could cause death or permanent disability to the public beyond the facility boundary. In addition to re-adopting the rules that provide requirements for developing and implementing risk management programs and making general clarifications, NJDEP adopted the following amendments (which are largely consistent with the September 2008 proposal): (1) elimination of the definition of and related provisions applying to "industrial complexes;" (2) revisions to how petroleum refining process units are defined and handled; (3) elimination of the "Program 2" release requirements and coverage of all facilities under the more stringent Program 3 requirements; (4) elimination of the definition of "state of the art" in light of the recent adoption of the requirement to perform "inherently safer technology" evaluations; (5) revisions to the concentration and likelihood criteria applicable to risk reduction in performing risk assessments; (6) certain revisions applicable to liquefied petroleum gas and reactive hazardous substances; (7) deletion of the exemption for Group I Reactive Hazard Substances ("RHSs") that have an inhibitor; (8) addition of an exemption for RHSs that cannot have a catastrophic accident; and (9) addition of organometallics to the list of RHS mixture functional groups. NJDEP also adopted amendments related to the TCPA program's penalty and confidentiality provisions and the provisions for determining threshold quantity applicability.

Energy

New Jersey Advances Three Renewable Energy Bills, Including Retail Margin Program for Combined Heat and Power Systems

Also under SUSTAINABILITY

by BRETT SLENSKY and MICHAEL NINES

On March 31, 2009, New Jersey Governor Jon S. Corzine signed three bills designed to promote and increase New Jersey's use of clean energy: A. 1448, the Residential Development Solar Energy Systems Act (the "Solar Act"); A. 2550, which supplements New Jersey's Municipal Land Use Law; and A. 2507, which amends the Electric Discount and Energy Competition Act.

The Solar Act requires developers to offer solar energy systems as an option in new home developments containing twenty-five or more residential units and to disclose certain related information to prospective purchasers (e.g., total system cost, benefits and potential energy cost savings, available incentives, etc.). The Solar Act also requires the New Jersey Department of Community Affairs to adopt applicable performance and installation standards, and the Act will not take effect until ninety days thereafter.

A. 2550 prescribes that a renewable energy facility (i.e., solar or wind) located on a parcel or parcels of land comprising twenty or more contiguous acres, and owned by the same person or entity, shall be considered a permitted use within every municipal industrial district.

Finally, A. 2507 authorizes the New Jersey Board of Public Utilities ("BPU") to use revenue from the existing retail margin charge levied against large industrial or commercial energy consumers to fund grants for projects designed to lower energy usage and reduce energy cost by those consumers. Specifically, the grant program will apply to projects which promote Combined Heat and Power ("CHP") co-generation, to tap heat produced from electrical generation to offset

other utility bills. Presently, there is already over $100 million in the Retail Margin Fund, and the fund will continue to grow. Of the funding available, $60 million will be appropriated to provide grants to companies seeking to install or expand CHP production. All grants will be awarded on a first-come, first-serve basis, and grant amounts will vary based on the amount of energy generated per company.

Most CHP systems include a natural gas-fueled combined cycle combustion turbine to produce both steam and electricity from a single fuel source located on-site. These highly efficient technologies recover heat that would otherwise be wasted during the generation of electricity and make use of that heat for commercial or industrial processes. This thermal energy may be used for direct heating, as a source for producing hot water or steam, or even for space conditioning and dehumidification. Other CHP technologies include fuel cells and internal combustion engines. CHP plants do not rely on new or breakthrough technology, as any increased efficiency is achieved by simply using more wasted energy to displace other heating and cooling energy sources. Examples include using waste heat to provide process heat, domestic hot water, and chilled water for air conditioning.

The BPU is encouraging a variety of facilities to consider CHP, including industrial parks, office parks, State institutions, pharmaceutical facilities, colleges and universities, hospitals and health care facilities, large retail centers, port facilities, and petroleum refining and chemical industries.

Strategies Emerge to Allow New Jersey to Meet Energy Master Plan's Energy Efficiency Goals

Also under SUSTAINABILITY

by BRETT SLENSKY

The Northeast Energy Efficiency Partnership ("NEEP") has released its final report setting forth a number of strategies which the state may implement to achieve the New Jersey Energy Master Plan's ("EMP") energy efficiency goal of a 20 percent reduction in overall energy consumption by 2020. The report's recommendations encompass a portfolio of interrelated programs and public policy changes to set new standards, build marketplace capacities and to provide assistance to a large majority of New Jersey residents, businesses, and institutions to significantly improve the energy performance of existing and new homes and buildings across a variety of market sectors.

Recommendations include the creation of a new energy efficiency utility, action to establish a market value for energy efficient homes and buildings (e.g., time of sale and building energy rating requirements for existing homes and buildings), updates to building energy sub-codes, policies to promote a long-term goal of net zero energy usage by new homes and buildings, and smart rate structures (e.g., time of use pricing) that encourage reduced consumption. According to the EMP's companion Implementation Strategy document, action by the Board of Public Utilities on NEEP's recommendations is anticipated to occur later this year.

"Green" or Energy Efficient Building Codes May Be on the Horizon

Also under SUSTAINABILITY and SITE DEVELOPMENT & BROWNFIELD REDEVELOPMENT

by MEREDITH DuBARRY HUSTON

Green building is on the rise along with calls to require it. However, at present, state mandated building codes can preempt local efforts to enhance building codes with incentives or requirements for green building practices. In both New Jersey and Pennsylvania, efforts are underway to modify state building codes to either allow or require buildings to be more sustainable or energy efficient.

In 2007, the New Jersey legislature authorized the preparation of a green building manual to ensure that standards are available for owners and builders who participate in programs encouraging or requiring green building. The state also adopted a definition of the term "green building" as "[b]uilding construction practices that significantly reduce or eliminate the negative impact of buildings on the environment and their occupants and may consider . . . [s]ustainable site planning; safeguarding water and water efficiency; energy efficiency and renewable energy; conservation of materials and resources; and indoor environmental quality."

New Jersey has yet to adopt a revision to its Uniform Construction Code requiring green building or allowing for the adoption of energy efficiency standards exceeding national standards. However, green building codes will likely play an important role in New Jersey's efforts to meet an aggressive mandate for a statewide reduction in greenhouse gas emissions under the state's Global Warming Response Act and related Energy Master Plan. Under New Jersey's Energy Master Plan, Governor Jon S. Corzine and state agencies are tasked to work with the Legislature to develop statewide building codes requiring new construction to be at least 30 percent more energy efficient than the current building code requires and also to develop a strategy to achieve net zero carbon emissions from buildings. Further information about how New Jersey will address green building in its building code is anticipated with the impending release of the final Global Warming Response Act Recommendations Report.

In Pennsylvania, Governor Edward G. Rendell proposed the development of a green building code for the state during his budget address on February 4, 2009. Similar to New Jersey, Pennsylvania has enacted a Climate Change Act ("Act 70"), which requires the Pennsylvania Department of Environmental Protection to suggest measures to reduce greenhouse gas emissions in the state. Although Act 70 does not mandate the implementation of green building initiatives, high performance building codes are likely to have top priority as Pennsylvania contemplates how to address greenhouse gas emissions in the state.

Also, on April 22, 2009, the International Code Council ("ICC"), the non-profit organization which develops and maintains the International Building Code, announced that it will be creating a "green" commercial building code. Interestingly, the uniform building codes in both New Jersey and Pennsylvania are based on the International Building Code. It remains to be seen whether the states or the ICC will lead the way in first developing code provisions that will enable the further development of green building.

Litigation

U.S. Supreme Court Issues Landmark Decision Under Federal Superfund Law

by ROBERT FOX and MICHAEL MELOY

On May 4, 2009, the United States Supreme Court, in an 8-1 decision written by Justice Stevens, issued a landmark decision involving the federal Superfund law. In *Burlington Northern & Santa Fe Railway Co. v. United States*, the Supreme Court held that mere knowledge of spills in the course of delivery of a useful product does not make the supplier of that product liable under Superfund as an arranger. Rather, Superfund requires intent to dispose of hazardous substances as an integral part of arranger liability. The Supreme Court held further that a liable party under Superfund may avoid joint and several liability by establishing a reasonable basis for apportioning the cost of the remedy. Significantly, the Supreme Court found that the length of time that a party owns a site, the percentage of a site owned by a party and even the volume of hazardous substances that contributed to the cost of the remediation of the site can all serve as a reasonable basis for apportionment thereby preventing the imposition of joint and several liability.

Facts and Procedural History

In 1960, Brown & Bryant, Inc., a chemical distributor, began operating on a parcel of land in Arvin, California. In 1975, Brown & Bryant expanded its operations to an adjacent parcel owned by two railroads. Shell Oil Company sold chemical products to Brown & Bryant. Chemical spills occurred during the transfer and delivery of Shell's product at the site. Aware that such spills were commonplace, Shell took several steps in the late 1970s to encourage the safe handling of its products during transfer and delivery. Some of the chemicals spilled at the railroad parcel impacted groundwater at the site and contributed to a portion of the cleanup costs.

In 1989, the United States Environmental Protection Agency and the State of California remediated the site and brought suit against Shell and the railroads to recover the governments' cleanup costs. The District Court found Shell liable under Superfund as a party who "arranged for disposal" under Section 107(a)(3) of Superfund and the railroads liable as site owners. The District Court held, however, that the liability of those parties was several, not joint and several, and apportioned 9 percent of the site liability to the railroads and 6 percent to Shell. The Ninth Circuit Court of Appeals affirmed that Shell and the railroads were liable under Superfund, but reversed the District Court's holding on joint and several liability. The Court of Appeals found that the evidentiary record was insufficient to establish apportionment on any basis and suggested that only precise evidence establishing the hazardous substances disposed of, in exact amounts, at exact locations over defined periods of time would suffice as evidence of a reasonable basis of apportionment. The Supreme Court then granted certiorari to review the decision.

Shell's Liability as an Arranger

The Supreme Court held that Shell was not liable as an "arranger" under Section 107(a)(3) of Superfund. The Supreme Court framed the issue as follows: on one extreme, an entity which enters into a transaction for the sole purpose of discarding a no longer useful product is liable as an arranger; on the other extreme, an entity which sells a new and useful product that unbeknownst to the seller is disposed of, is not liable. The Supreme Court then probed the "many permutations of 'arrangements' that fall between these two extremes."

The Supreme Court held that the key determination was not what the nature of the transaction involved ("sale" versus "disposal"), but rather that the plain meaning of the term "arrange" implies intent to dispose, not mere knowledge. In this case, the facts did not support the conclusion that Shell "intended" to dispose of its product at the site. To the contrary, the evidence revealed that Shell took numerous steps to avoid the spills and releases associated with the handling of its products by Brown & Bryant and thus was not liable as an arranger.

Apportionment

The Supreme Court endorsed the traditional test under the Restatement (Second) of Torts for determining whether liability is joint and several or divisible in a Superfund action. Under the Restatement, the harm is divisible if it is a distinct harm or "there is a reasonable basis for determining the contribution of each cause to a single harm." The Supreme Court found that the record before the District Court established three reasonable bases for apportionment: the railroad parcel constituted only 19 percent of the surface area of the entire site; Brown & Bryant leased the railroad parcel for only 45 percent of the time that the site was operated; and two of the substances spilled on the railroad parcel contributed to two-thirds of the overall site remediation costs. When multiplied together and including a rounding factor, the railroads could establish a severable share of 9 percent.

The Supreme Court concluded that what the District Court had done was reasonable and sufficiently supported by the record, and therefore reinstated the District Court's ruling on joint and several liability.

Impact of the Decision

The Supreme Court's opinion is likely to have an impact on arranger liability cases that do not involve the unambiguous, "intended" disposal of waste. Arranger liability for pesticide formulation, sale of co-products and certain, non-exempt recycling activities will now be subject to litigation as to whether disposal was "intended."

More significantly, the opinion throws open the door to a potentially wide spectrum of apportionment arguments in defending against government actions and private cost recovery and contribution claims. The imposition of joint and several liability may no longer be virtually automatic and parties are likely to consider strongly divisibility arguments as an important part of their strategy in all Superfund cases. Essentially, what were formerly arguments related solely to equitable allocation among Superfund liable parties have been elevated to arguments that may defeat joint and several liability as a threshold consideration.

Court Says Offer to Pay for Liability Waiver Does Not Satisfy Notification Requirement

by LYNN ROSNER RAUCH

In the continuing saga of *Aviall Services Inc. v. Cooper Industries LLC*, the U.S. District Court for the Northern District of Texas addressed a party's compliance with the public notice and comment obligations under the National Contingency Plan ("NCP") in connection with a cost recovery action brought pursuant to the Comprehensive Environmental Responsibility, Compensation, and Liability Act ("CERCLA"). Aviall sued Cooper under CERCLA Section 107(a)

to recover remedial investigation and response costs that Aviall had incurred in connection with the cleanup of two sites previously owned by Cooper—the Love Field and the Carter Field. Cooper moved for summary judgment arguing that Aviall failed to comply with the notice and comment requirements of the NCP and therefore its claims were precluded. The Court granted Cooper's motion as to Love Field and denied it as to Carter Field.

The Court agreed with Cooper that Aviall's failure to notify a dozen downgradient neighbors until after completing its remedial investigation undercut the NCP requirements pertaining to Love Field, notwithstanding Aviall's representation that it had advised the property owners that it would take steps to relieve them of personal liability for any contamination. The Court dismissed Aviall's attempt to recover remedial investigation costs based on whether Aviall substantially complied with NCP's requirement that "parties who might foreseeably be affected by the private party's decisions must be given a meaningful opportunity to participate in them." Cooper and Aviall disagreed about which landowners were "foreseeably affected" and therefore entitled to the notice that could provide a meaningful opportunity to participate. Finding that the 12 downgradient property owners were foreseeably affected by contamination migrating from Love Field, but were not timely notified by Aviall to allow them to meaningfully participate in the remedial investigation, the Court rejected Aviall's defense that public participation is unnecessary during the remedial investigation phase if subsequent opportunity for participation is provided. Unless the opportunity to participate in the remedial investigation is meaningful, there is not substantial compliance with the NCP's requirement for public participation. In turn, because the legislature saw fit "to limit CERCLA's remedy to costs that are consistent with the NCP," Aviall was not entitled to recover those remedial investigation costs associated with Love Field from Cooper, warranting the entry of summary judgment in Cooper's favor.

On the other hand, the Court denied Cooper's motion for summary judgment as to Aviall's response costs incurred for clean up of Carter Field, where the contamination was mostly confined within the site's boundaries. Cooper again argued that neighboring landowners were foreseeably affected by contamination on Carter Field, in this instance based on the risk of environmental contamination and resulting stigma damages from the threat of its migration. Aviall countered that the stigma theory was too attenuated to render the landowners neighboring Carter Field to be considered foreseeably affected. The Court disagreed with Aviall, observing that downgradient property owners threatened with migrating contamination potentially could be foreseeably affected, but also remarked that whether those property owners were foreseeably affected was a decision in the province of the finder of fact, and thus not appropriate for determination on summary judgment. Accordingly, the Court denied Cooper's motion as to response costs associated with Carter Field.

Court Limits Applicability of "Imminent and Substantial Endangerment" Under RCRA

Also under WASTE

by MICHAEL MELOY

In a decision issued in *Scotchtown Holdings LLC v. Town of Goshen* on January 5, 2009, the U.S. District Court for the Southern District of New York placed limits on the types of claims that are actionable under the citizen suit provisions of the Resource Conservation and Recovery Act

("RCRA"). One of the key features of RCRA is that it allows private parties under Section 7002(a)(1)(B) to bring suit against those that have contributed or are contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present "an imminent and substantial endangerment to health or the environment." The concept of what qualifies as an imminent and substantial endangerment to health or the environment has proved to be quite elastic. Despite the import of the words used by Congress in drafting RCRA, the courts have seemingly been quite willing to apply the label to a broad spectrum of environmental conditions and situations. However, in *Scotchtown Holdings*, the Court took the step of dismissing the case on the basis that no imminent and substantial endangerment existed in light of the facts that had been alleged.

In *Scotchtown Holdings*, a private property owner brought a citizens suit under Section 7002(a)(1)(B) of RCRA against the local municipality and the superintendent of highways for the municipality alleging that they had used road salt (sodium chloride) to treat snow and ice which in turn accumulated in snow banks along the sides of the roads and ultimately leached into groundwater beneath the plaintiff's property. The salt intrusion into the groundwater allegedly caused the groundwater to be unsafe for human consumption, thereby preventing the plaintiff from proceeding with plans to develop its property for residential purposes. The Court noted that under the citizens suit provisions of RCRA, an imminent threat did not mean that the threat had to be immediate. Instead, the threat simply had to be currently present even if its impact might not be felt until later. In parsing the allegations advanced by the plaintiff, the Court concluded that although groundwater might be impacted by road salt on the plaintiff's property, the plaintiff failed to show that such conditions qualified as an imminent and substantial endangerment because no one was currently using the groundwater and the impacts to groundwater were sufficient that, according to the plaintiff, they would preclude development of the property thereby eliminating the potential for future consumption of the contaminated groundwater. The Court acknowledged that the property owner found itself in a "Catch-22" situation but determined that a RCRA citizens suit was not the appropriate vehicle to address the property owner's grievances.

Failure to Timely Appeal NJDEP Administrative Orders Provides for Harsh Consequences

by ANGELA PAPPAS

In *Department of Environmental Protection v. Mazza and Sons, Inc.*, the New Jersey Superior Court held that if a party to whom a final administrative order has been issued fails to file a timely appeal from that order, that party may not subsequently collaterally attack the order in an enforcement action brought by the New Jersey Department of Environmental Protection ("NJDEP").

In April 2006, NJDEP issued an Administrative Order and Notice of Civil Administrative Penalty Assessment ("Order") against defendant Mazza and Sons, Inc. ("Mazza") on the basis that Mazza violated various regulations governing solid waste facilities. The Order required Mazza to undertake various remedial measures and imposed a penalty of $27,000. After Mazza was denied a hearing to challenge the Order because the request was untimely and then subsequently failed to appeal the denial of a hearing, NJDEP initiated an enforcement action.

The Court concluded that pursuant to New Jersey rule, Mazza may not collaterally attack the Order in NJDEP's enforcement action because they failed to timely appeal from the Order. However, the Court emphasized that its holding does not entitle the agency to automatic judicial enforcement of the Order. Rather, NJDEP is still required to show that Mazza failed to comply with the Order and that the Court's assistance is needed to secure compliance. Accordingly, the Court upheld the penalty portion of the Order, however, it remanded the remedial portions for an evidentiary hearing on the issue of Mazza's compliance.

District Court Finds EPA's Involvement in Cleanup Unnecessary to Deem Settlement between State and Private Party "Judicially Approved"

by NICOLE MOSHANG

In *Westinghouse Electric Co. v. United States*, the U.S. District Court for the Eastern District of Missouri recently held that a state settlement with a private party, in the absence of an express delegation from the Environmental Protection Agency ("EPA"), constitutes a judicially approved settlement under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") for purposes of triggering Section 113 private party contribution rights, although there remains a split of authority on the issue.

In *Westinghouse*, the Court reversed its July 2008 decision denying Westinghouse's Section 113 claim against companies that once either owned or operated a nuclear fuel facility on the property, including the United States. The earlier decision held that the consent decree with Missouri could not, as a matter of law, constitute a "judicially approved settlement" under Section 113 because Missouri had never entered into a Section 104 cooperative agreement with the EPA related to the contaminated property. In reversing the prior ruling issued by a previous judge, the Court held that the state did not need EPA involvement to clean up the site on its own and then sue under Section 107 and therefore, the consent decree could be the basis of a contribution claim because it stemmed from a Section 107 action filed by Missouri against Westinghouse.

Ironically, the Court noted that its finding was based in part upon the United States' support of its position, even though the United States is one of the targeted contribution defendants in the Section 113 action. In this regard, the United States argued in its brief that "States have authority to recover response costs under CERCLA Section 107(a)(4)(B) absent a delegation of authority from the United States Environmental Protection Agency" and therefore, the consent decree may have triggered contribution rights by Westinghouse. The Court's decision in *Westinghouse* is consistent with decisions from the Ninth and Second Circuit Court of Appeals, although more recent contrary decisions have been issued from the Northern and Western District Courts of New York and the District Court of Arizona.

U.S. Supreme Court Recognizes EPA Authority to Consider Costs and Benefits in Setting Cooling Water Intake Structure Standards

Also under WATER

by CHRISTOPHER BALL

On April 1, 2009, the United States Supreme Court issued a ruling with potentially sweeping impacts for electric utility and industrial facility use of cooling water throughout the country. The case, *Entergy Corp. v. Riverkeeper, Inc.*, centered on the issue of whether the U.S. Environmental Protection Agency ("EPA") can compare costs and benefits of various technologies when setting national performance standards for cooling water intake structures under Section 316(b) of the federal Clean Water Act, which requires such structures to reflect the "best technology available for minimizing adverse environmental impact" or "BTA." In ruling that EPA could permissibly consider costs and benefits, the Court reversed an earlier Second Circuit Court of Appeals ruling, and supported EPA's previous determination not to mandate the use of closed-cycle cooling water towers for existing power plants subject to the EPA rulemaking at issue. Thousands of power plants and industrial facilities rely on significant quantities of cooling water for their operations and could be affected by the Supreme Court ruling.

The *Entergy* litigation involved the second of three EPA regulations addressing the Section 316(b) requirements, which mandate that the location, design, construction and capacity of cooling water intake structures reflect BTA. The first rule regulated cooling water intake by new power plants, and required the largest of those plants to restrict their intake of cooling water to the level that would be obtained if they employed closed-cycle recirculating cooling water systems. In the second rule ("Phase II rule"), issued in 2004 and applicable to existing power plants, EPA did not mandate closed-cycle technologies or equivalent results. Instead, the agency considered the comparative costs and benefits of various technologies in determining the best technology available for existing power plants to minimize adverse environmental impacts. Based on that analysis, the Phase II rule set national performance standard ranges for existing power plants reflecting the anticipated results of a suite of BTA technologies, and provided five compliance alternatives for meeting the BTA standard. The Phase II rule also allowed individual power plants to seek variances from the generally applicable national standards through site specific demonstrations that the cost of compliance with the national standards for a given facility would be (1) significantly greater than the costs considered by EPA in setting the standards ("cost-cost alternative"), or (2) significantly greater than the benefits of complying with the standards ("cost-benefit alternative").

Environmental groups and several states challenged the Phase II rule, arguing, in part, that EPA exceeded its statutory authority in comparing costs and benefits in the rulemaking, and in promulgating the resulting performance ranges, compliance alternatives, and cost-based site-specific variances. In a January 2007 ruling, the Second Circuit Court of Appeals largely agreed with the rule challengers, concluding that cost-benefit analysis was impermissible under Section 316(b) and accordingly remanded to EPA those provisions of the Phase II rule such as the BTA determination and cost-benefit compliance alternative that relied on such an analysis. The Second Circuit also remanded several additional provisions of the rule based on perceived procedural rulemaking flaws or EPA exceedance of its authority unrelated to the use of cost-benefit analysis. Following the Second Circuit ruling, and pending the appeal before the

Supreme Court, EPA suspended the Phase II rule, leaving existing power plants without regulatory compliance alternatives and instead subject to case by case best professional judgment determinations of the relevant permitting authority.

The *Entergy* appeal before the Supreme Court was limited to the single question of whether Section 316(b) of the Clean Water Act authorizes EPA to compare costs with benefits in making its BTA determination. On that issue, the Court reversed and remanded the Second Circuit ruling in a 6-3 opinion authored by Justice Scalia. The Court held that it is reasonable for EPA to conduct a cost-benefit analysis in (1) setting national performance standards for cooling water intake structures under Section 316(b), and (2) providing for site-specific cost-benefit variances to the national performance standards. The matter now returns to the Second Circuit, which must reassess the Phase II rule consistently with the Supreme Court's ruling and determine whether grounds still exist to remand the rule to EPA.

While the practical effect of the Entergy ruling is to support EPA's determination not to mandate closed-cycle cooling water towers (or equivalent associated reductions in environmental impacts) for all existing power plants regulated under Section 316(b), many questions remain. The ruling only deals with EPA's authority to conduct cost-benefit analyses, and does not reach the other bases for the Second Circuit's remand of the Phase II rule to EPA, which implicate provisions of the rule including EPA's use of performance standard ranges, the cost-cost compliance alternative, and the agency's allowance of "restoration measures" as a compliance alternative. Additionally, the Entergy ruling only supports EPA's discretion to consider costs and benefits, but imposes no affirmative obligation on the agency for their consideration. The current remand of the Phase II rule is therefore unencumbered by mandates from the Court, and, should the remand continue, the rule may be subjected to further changes reflecting the discretion and policy determinations of the Obama administration. Finally, while BTA determinations for cooling water intake structures at industrial facilities are not covered by the Phase II rule (they are subject to the best professional judgment of the permitting authority), the ruling may nonetheless have an impact on future industrial facility permitting requirements by supporting the ability of the relevant permitting authority to compare costs and benefits in exercising its judgment.

NJ Court Rejects NJDEP's Use of Dispute Resolution Process to Avoid Statutory and Regulatory Requirements

by CHRISTOPHER BALL

In an appeal brought under New Jersey's Coastal Area Facility Review Act ("CAFRA"), the Appellate Division of the Superior Court of New Jersey recently addressed the issue of whether an administrative agency can effectively override statutory and regulatory requirements though the dispute resolution process. The case, *Dragon v. N.J. Department of Environmental Protection*, found its roots in two Brigantine, NJ property owners' desire to demolish their existing home and build a new, larger, oceanfront home nine feet closer to the ocean. The property owners applied to the New Jersey Department of Environmental Protection ("NJDEP") for a coastal general permit under CAFRA for the proposed demolition and construction. NJDEP denied the application for the general permit after determining that the property in question was entirely within the coastal high hazard area, and that the proposed development did not meet any of the limited regulatory exceptions to CAFRA's general ban on development in the coastal high hazard area.

The property owners appealed NJDEP's permit denial, and the matter was transferred to the Department's office of dispute resolution. Citing a "litigation risk," NJDEP settled the homeowner's challenge through a "Mediation and Settlement Agreement In Lieu of a Permit." Arguing that it has the authority to "deviate from strict compliance with its own regulations" in order to avoid a possible adverse legal ruling, NJDEP issued a "Letter of Authorization" approving the proposed demolition and construction subject to certain conditions designed to meet several of the environmental concerns underlying the regulation's development ban. Neighboring property owners challenged the settlement agreement and Letter of Authorization, arguing that NJDEP had exceeded its authority under CAFRA by bypassing substantive regulations and issuing approval in lieu of the permit required by the regulations.

The Appellate Division agreed with the third-party challengers, holding that, given the express language of the limited exceptions to the regulatory development ban, which the proposed development clearly did not meet, NJDEP did not correctly assess its "litigation risk." More importantly, the Court stated that CAFRA does not give NJDEP the power to authorize a proposed development in the coastal region in either a settlement agreement or an authorizing letter "in lieu of" a formal permit. Because an agency may not give itself authority not legislatively delegated, the Court concluded that NJDEP could not use its settlement process to circumvent CAFRA's substantive permitting requirements and allow regulated development in a coastal region governed exclusively by CAFRA and its implementing regulations.

Site Remediation

EPA Clean and Green Remediation Policy

by DARRYL BORRELLI

The U.S. Environmental Protection Agency ("EPA") is considering options for the development of voluntary standards and a verification system which will promote and properly recognize the benefits of conducting green cleanups at contaminated sites. EPA's Office of Solid Waste and Emergency Response is currently working with state agencies to develop a framework outlining desired outcomes for a green cleanup standard which it plans to finalize and post in June 2009. Thereafter, EPA will collaborate with ASTM International on the standards development process. EPA considers green cleanups to promote efficient, cost effective, low impact remedies which can also spur sustainable development. In concert with this approach, EPA Region 2 has produced a Clean and Green Policy which is available on its website.

Interestingly, in an effort to promote cost effective site cleanups and contaminated site reuse, we have historically advised clients to utilize many of the green concepts now being promoted by EPA, particularly the on-site reuse of demolition and other waste materials. In establishing its life cycle scoring system, remedies which minimize the use of fossil fuels, such as natural attenuation and engineering controls, should be given priority points. If you are interested in providing input to EPA on its green cleanup standard initiative or in discussing the concepts of green cleanups, please contact Darryl Borrelli (dborrelli@mgkflaw.com).

NJ Site Remediation Reform Legislation Becomes Law Accompanied by Executive Order

by CHRISTOPHER BALL

On May 7, 2009, Governor Jon S. Corzine signed legislation into law significantly reforming the way contaminated sites are cleaned up in New Jersey. The new Site Remediation Reform Act ("SRRA") brings privatization to the clean-up process by placing primary oversight responsibility for most remediations into the hands of environmental consultants who will be licensed as Licensed Site Remediation Professionals ("LSRPs") by a newly created licensing board. As detailed in a previous MGKF Special Alert (http://www.mgkflaw.com/specAlert2009/specAlert-2009-03-18.html), and a Questions and Answers document (http://www.mgkflaw.com/specAlert2009/specAlert-2009-03-18.pdf), significant elements of the SRRA include:

- All remediations, with limited exceptions, must use an LSRP (subject to a phase-in period extending up to three years depending on the nature of the case);
- Until the LSRP board is established and its regulations are developed, the New Jersey Department of Environmental Protection (NJDEP) will issue temporary licenses;
- The licensing board will oversee LSRP conduct under a newly created detailed code of conduct;
- While most cases will proceed under the primary oversight of an LSRP (subject to NDJEP audit), a select group of cases will remain under direct NDJEP oversight;
- New limitations will be imposed on the ability of a remediating party to select the remedial action for the site for certain sensitive land uses (e.g., residential, schools) and direct oversight cases;
- Mandatory timeframes will be established by NJDEP for initiating and completing various remediation activities; and
- A new permitting program will be established for monitoring and maintenance of engineering and institutional controls;
- The statute of limitation applicable to claims by the State for natural resource damages associated with many sites will be extended.

Governor Corzine also issued a potentially significant Executive Order (http://www.state.nj.us/infobank/circular/eojsc140.htm) to accompany the SRRA. The Executive Order, touted by the Governor as establishing comprehensive oversight and transparency within the LSRP program, requires NJDEP to file annual reports on the progress of the LSRP program with the Governor and the Legislature, and to post all documents submitted by LSRPs on the Internet. Of greater concern to parties conducting remediations, the Executive Order requires NJDEP to increase its oversight of any site containing groundwater contaminated above remediation standards, or which may be used for residential or educational purposes. The Executive Order further requires NJDEP to conduct a review (audit) of case documents submitted by *every* LSRP within the next 2 years (the SRRA only requires audits of at least 10 percent of all LSRP submittals annually), and to promulgate rules "insulating an LSRP's professional judgment from economic pressures to the maximum extent practicable."

NJDEP is now required to set up the temporary licensing program for LSRPs within 90 days, and develop interim program rules within 6 months before moving on to formal promulgation of the SRRA's final implementing regulations.

Sustainability

NAIC Adopts Climate Risk Disclosure Requirement for Insurers

by JOHN GULLACE
The National Association of Insurance Commissioners ("NAIC") recently adopted a requirement that insurance companies prepare an annual disclosure identifying their financial exposure from climate change. Insurers will be required to report on (1) how they are altering their risk-management and catastrophe-risk modeling in light of the challenges posed by climate change, (2) steps they are taking to engage and educate policymakers and policyholders on the risks of climate change, and (3) any changes in investment strategy due to climate change considerations.

The NAIC requirement still needs to be adopted state-by-state, but is expected to be implemented swiftly. The required "Insurer Climate Risk Disclosure Survey" would become an annual reporting requirement for insurers beginning in May of 2010 as adopted by the NAIC.

MGKF Joins Greater Philadelphia Green Business Program

by JOHN KIRK
Bruce Katcher represented our firm as a charter member of the Pennsylvania Environmental Council's ("PEC") Greater Philadelphia Green Business Program ("GBP") which was launched last month by PEC and endorsed by the PENJERDEL Council. Bruce serves as a member of the PENJERDEL Executive Committee and served on the planning committee that developed the GBP. Participation in the GBP (www.phillygreenbiz.com) involves making a commitment to implement green business practices. By making this public commitment to sustainability, we are further reinforcing our firm's green business practices, many of which have been in place since the founding of the firm almost twenty years ago. Practices such as participating in EPA's Green Lights Program, using duplex printing and copying, and purchasing office paper and other supplies made from recycled content are just the tip of the iceberg in our daily operations. If you would like to learn more about our practices and procedures, or would like assistance in implementing green practices in your organization, contact Bruce Katcher (bkatcher@mgkflaw.com) or John Kirk (jkirk@mgkflaw.com), our Director of Administration.

Waste

Coal Ash Proposed Rules Expected by Year's End

by BRETT SLENSKY
The U.S. Environmental Protection Agency ("EPA") is currently working with the regulated community, states and other federal agencies to gather information on coal ash storage practices and related issues, which EPA will then use to formulate its proposed regulations expected to be issued by year's end. In light of EPA's action, the House Natural Resources Committee announced that it will not pursue its legislation introduced earlier this year (H.R. 493, the Coal Ash Reclamation, Environment and Safety Act of 2009) which would have given the Interior Department the authority to regulate coal ash. One divisive issue likely to be

addressed by EPA in its proposed rules will be the continued classification of coal ash as a non-hazardous waste.

The Pennsylvania Department of Environmental Protection ("PADEP") is also working on draft coal ash regulations and on March 19, 2008, PADEP's Solid Waste Advisory Committee ("SWAC") voted to forward draft regulations to the Environmental Quality Board ("EQB") for proposed rulemaking. The current formulation of the draft regulations (proposed Chapter 290 of the Pennsylvania Code) address coal ash beneficial use and storage, and incorporates, with modifications, PADEP's existing regulations found at 25 Pa. Code § 287.662-.666, as well as a number of the requirements presently found in PADEP's other pertinent policy documents. The EQB is anticipated to act on the draft regulations later this year, and significant public comment is anticipated following EPA's and EQB's issuance of proposed rules.

Pennsylvania's Consolidation of the Municipal and Residual Waste Regulations is Moving Forward

by BRETT SLENSKY

The Pennsylvania Department of Environmental Protection's ("PADEP") effort to merge and rewrite the municipal and residual waste regulations has moved one step closer to becoming a reality. On March 19, 2009, PADEP's Solid Waste Advisory Committee ("SWAC") voted to forward the package of regulatory amendments to the Environmental Quality Board for proposed rulemaking. This regulatory consolidation has been in the works for several years and is intended to address the areas of overlap between the two sets of regulations and to promote recycling and waste reduction activities while maintaining the Solid Waste Management Act's municipal and residual waste distinction.

PADEP's planned regulatory amendments affect virtually all aspects of the municipal and residual waste regulations and will have important ramifications for Pennsylvania's regulated community. Key changes to the existing regulation that are proposed in the draft package include several modifications to existing definitions (e.g., a unified definition of waste), a number of new definitions, modifications to the residual waste generator requirements, recycling and beneficial use provisions and permitting requirements. The proposed rules are anticipated to be issued later this year and significant public comment is anticipated.

Water

NPDES Discharge Monitoring Reports May Soon Be Filed Electronically

by JONATHAN RINDE

The U.S. Environmental Protection Agency ("EPA") reports that, as a result of a grant to the Environmental Council of States, it has developed a web-based tool, called NetDMR, that allows holders of National Pollutant Discharge Elimination System ("NPDES") permits to submit Discharge Monitoring Reports ("DMRs") to permitting authorities electronically. States which

have been delegated NPDES permitting authority do not have to use NetDMR, but may request to use it. EPA estimates that annually, 100 Million dollars could be saved by industry, states and the federal government upon full implementation of NetDMR.

NJDEP Proposes to Set MCL for Perchlorate

by JONATHAN RINDE

The New Jersey Department of Environmental Protection ("NJDEP") seeks to amend the New Jersey Safe Drinking Water Act ("SDWA"), the Private Well Testing Act ("PWTA") and the Regulations Governing the Certification of Laboratories and Environmental Measurements ("LEM Regulations"), to impose standards, monitoring, compliance, public notification and reporting requirements for perchlorate, a chemical compound of concern for which no federal or state drinking water standard currently exists. Specifically, NJDEP proposes to amend the SDWA to establish a maximum contaminant level ("MCL") of 5 ug/l for perchlorate and include rules specifying the monitoring, compliance and public notification requirements for perchlorate. With respect to the PWTA, NJDEP proposes to amend the rules to include perchlorate in the list of parameters tested in wells subject to the PWTA, which requires sampling of private portable wells prior to a sale or lease of properties served by private potable wells to ensure that prospective purchasers or lessors are aware of the quality of the drinking water prior to the sale or lease. Lastly, NJDEP proposes to amend the LEM Regulations to require laboratories to report to the appropriate administrative agency and inform their clients of any perchlorate MCL exceedance within 24 hours of learning of such results.

EPA Waives ARRA's "Buy American" Requirement for Certain Water Projects

by BRYAN FRANEY

On April 7, 2009, the U.S. Environmental Protection Agency ("EPA") issued a nationwide waiver of the "Buy American" requirements of the American Recovery and Reinvestment Act of 2009 ("ARRA") for certain water projects refinanced through the Clean or Drinking Water State Revolving Funds ("SRFs"). The scope of the waiver is limited to projects that incurred debt between October 1, 2008 and February 17, 2009 and that are refinanced through the SRFs using ARRA funds. The "Buy American" provision requires that all public works projects receiving funding under the ARRA must use iron, steel, and manufactured goods produced in the United States, unless a federal agency determines that the requirement would be inconsistent with the "public interest."

Prior to the adoption of the ARRA on February 17, 2009, several states moved forward with job-creating SRF projects, while other states deferred projects in hopes that the ARRA would provide more favorable financing terms. To reward those states that moved forward with job-creating SRF projects, the ARRA explicitly authorized the refinancing of debts incurred on or after October 1, 2008, but before February 17, 2009. As noted by EPA, several of these early project proponents may have contracted for non-U.S. manufactured goods. To require these projects to meet the Buy American requirement would entail "time-consuming delay and thus displace the 'shovel-ready' status of these projects." EPA noted that in all cases, project

proponents proceeded in good faith and without fair notice as to the existence and scope of the Buy American requirement. Thus, EPA invoked the "public interest" exception and waived the Buy American requirements for those SRF projects that incurred debt between October 1, 2008 and February 17, 2009. Due to these narrow and unique circumstances, it is unlikely that EPA's waiver will serve as a precedent for other agencies.

PADEP to Adopt New TDS Regulations

by MARC GOLD

Spawned in part to address the potential impacts from the development of the Marcellus Shale reserves, the Pennsylvania Department of Environmental Protection ("PADEP") has announced its intention to adopt new treatment requirements and water quality standards to control total dissolved solids, sulfates and chlorides. In its *Permitting Strategy for High Total Dissolved Solids Wastewater Discharges* (April 11, 2009), PADEP describes a program that requires new high-total dissolved solids ("TDS") dischargers to install adequate treatment to meet requirements based on the receiving stream's assimilative capacity, and dischargers to publicly owned treatment works must meet local limits. For existing dischargers, any increase in TDS loads before January 1, 2011, will be subject to the requirements for new sources and increases that occur after January 1, 2011 will be subject to the new regulations that PADEP plans to incorporate into Chapters 93 and 95 of its regulations. PADEP expects to have those regulatory provisions in place by January, 2011. These new regulations, which are to be proposed for comment within the next few months, have the potential to significantly effect discharge requirements for most major NPDES permit holders.

Other Regulatory Programs

President Obama Moves to Update Review Process for EPA Rules

by CHRISTOPHER BALL

President Obama signaled his intent to revisit the process and principles governing the review of federal regulations in Executive Order No. 13,497. For more than two decades, the Office of Management and Budget ("OMB") has played a central role in reviewing federal regulations, including those promulgated by the U.S. Environmental Protection Agency ("EPA"). OMB's role, and the framework for modern regulatory review, is rooted in a 1993 Executive Order issued by President Clinton, through which OMB was tasked with reviewing federal agency actions to determine their economic costs and benefits and ensuring their consistency with Presidential priorities. Depending on the outcome of the process initiated by Executive Order No. 13,497, the role that the White House, and OMB in particular, plays in the promulgation and review of agency regulations could be fundamentally altered.

Indeed, the recently issued Executive Order directly affects OMB's ongoing regulatory review role by revoking two executive orders issued by President George W. Bush, which amended President Clinton’s 1993 executive order. The Bush orders had (1) expanded the scope of OMB regulatory review to include agency guidance documents, (2) required agencies to justify to

OMB any new regulation by identifying the "market failure" that necessitated the regulation, and (3) required Regulatory Policy Officers in every agency to be presidential appointees. Citing the lessons learned about regulation since 1993, the recently issued Executive Order requires the Director of OMB to produce a set of recommendations for a new Executive Order on federal regulatory review within 100 days. The anticipated OMB recommendations, which are expected to be completed in the near future, have been the focus of significant public interest since they are expected to offer suggestions on such central regulatory review issues as the roles of cost-benefit analysis and behavioral sciences in federal regulation.

EPA Halts Performance Track Program

by MICHAEL GROSS
On March 16, 2009, U.S. Environmental Protection Agency ("EPA") Administrator Lisa Jackson announced the termination of EPA's nine-year-old National Environmental Performance Track Program (the "Performance Track Program"). The Performance Track Program encouraged facilities to voluntarily establish measurable goals aimed at improving environmental quality. In exchange for participating in the Performance Track Program, participants faced reduced inspections and gained flexibility with respect to certain regulatory requirements. Since its inception, approximately 500 facilities in 22 different states entered the Performance Track Program. EPA is presently conducting two comprehensive reviews of the Performance Track Program to determine its efficacy as it evaluates the potential for future environmental stewardship programs within the agency. EPA has also issued follow-up guidance to Performance Track Program participants indicating that such participants and their facilities are no longer considered to be a "low priority for routine inspection" by EPA. Performance Track Program participants have also been advised that all regulatory incentives existing pursuant to the program have been discontinued. While Administrator Jackson acknowledged in her memorandum terminating the Performance Track Program that participants "have made significant reductions in greenhouse gas emissions and energy consumption," she further found that the program "was developed in a different era and may not speak to today's challenges."

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