



2011 FORECAST

CHANGES IN ADMINISTRATION AND BUDGET CONSTRAINTS EXPECTED TO IMPACT PENNSYLVANIA'S ENVIRONMENTAL AGENDA IN 2011

by BART E. CASSIDY, MICHAEL C. GROSS and BRYAN P. FRANNEY

As our clients are aware, MGKF strives to remain attuned to changes in governance at the state and federal levels, in order to anticipate regulatory changes and how these developments will impact our clients. We are focusing close attention now to the change in administration in Harrisburg and the unprecedented budgetary constraints facing the Commonwealth. This, coupled with the prominence of the Marcellus Shale, will likely result in a realignment of environmental priorities and strategies in Pennsylvania.

Like many governors around the country, Governor Tom Corbett will be working to address substantial budgetary shortfalls, while simultaneously balancing the budget and intending to honor election-related commitments to avoid tax increases. These constraints necessarily leave two options: (i) reductions in staff and other regulatory agency expenses, and (ii) creation of and increases in alternative forms of revenue. Industries subject to environmental regulation in Pennsylvania are likely to feel the impact of both options in 2011. As a concrete example from an expenditure perspective, budgetary restrictions are likely to result in a reduction in permit application review staff, and therefore, may cause further delays in securing necessary environmental permits and approvals from these agencies.

We expect the Corbett administration to take a strong role in issues concerning drilling in the Marcellus Shale and protecting clean air and water in the Commonwealth, from both environmental and economic perspectives. These issues and the challenges they bring will likely be an early focus of the Honorable Michael Krancer, incoming Secretary of the Pennsylvania Department of Environmental Protection ("PADEP"), serving as the Acting Secretary until his official confirmation as Secretary. Based on our experience with Acting Secretary Krancer, it is fortunate for the regulated community and environmental practitioners that he is well-versed in the nuances of Pennsylvania environmental law, accumulated over his

twenty-five years in private practice, as in-house counsel and as former Chairman and Chief Judge of the Pennsylvania Environmental Hearing Board.

Other issues we foresee on the near horizon include the likelihood that PADEP will be confronted with the resolution of a jurisdictional issue concerning the permitting of transmission pipelines between the Commonwealth and the federal government, which will implicate PADEP, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers. In addition, we anticipate a reduction and reassignment of energy grants within PADEP, which will likely transpire in the context of a broader effort to determine which Commonwealth agency will administer those grants. On the revenue side, Pennsylvania agencies have proposed significant increases in air quality emission fees and mining fees and it is expected that the natural gas industry will also face significant increases in regulatory fees.

Revenue-restructuring efforts are also underway at the municipal level in Pennsylvania. A prime example is the Philadelphia Water Department's ("PWD") new billing system for stormwater management services. Under the former billing system, PWD customers were charged for stormwater management based on the size of their water meters. Under the new system, non-residential customers are charged based upon the property's size and how much of the property is covered by impervious surfaces (e.g., roofing and pavement). Beginning on July 1, 2011, customers' bills will be calculated so that 50 percent of stormwater fees will be based on the historic billing system and 50 percent will be based on the new system. It is expected that stormwater fees under the new system will increase (sometimes dramatically) for those customers with large impervious surface areas. MGKF has been successful in assisting customers to obtain relief from increased fees by implementing stormwater management practices and/or demonstrating that existing practices already reduce the burden on PWD's system.

ANTICIPATED REGULATORY INITIATIVES AND DEVELOPMENTS FOR 2011

CLIMATE CHANGE

by TODD D. KANTORCZYK

The mid-term election results have all but assured that Congress will not pass any comprehensive climate change legislation during the next Congress. In the face of this political reality, the climate change activity in 2011 promises to originate from a wide variety of sources, including the U.S. Environmental Protection Agency ("EPA") regulatory programs, Congressional efforts to restrict EPA authority, court decisions concerning common law remedies and EPA authority, and state and local initiatives.

On the federal regulatory front, January 2, 2011 marked the start date of EPA's phased "Tailoring Rule," which generally requires large new or modified facilities with significant increases in greenhouse gas emissions to obtain Prevention of Significant Deterioration ("PSD")

permits that, among other things, require affected sources to apply Best Available Control Technology (“BACT”) to control greenhouse gas (“GHG”) emissions. In November 2010, EPA issued guidance intended to assist states in making these BACT determinations, which placed much emphasis on energy efficiency measures. In our experience, the PSD process can significantly complicate and delay planned construction projects, and adding GHG considerations to this mix can only serve to exacerbate these issues, especially given the absence of any experience at the state level in making BACT determinations for GHG emissions.

In addition, as part of two settlements with states and environmental groups reached at the end of 2010, EPA announced that it will propose GHG limits for fossil fuel fired power plants and refineries by revising applicable New Source Performance Standards. The new standards would affect new, modified and existing sources in these industries. The power plant standards will be proposed by July 26, 2011, and the refinery standards will be proposed by December 15, 2011.

In the face of this regulatory activity, certain members of Congress have already introduced a number of bills that would severely restrict EPA’s ability to regulate GHG emissions. These efforts include the introduction of bills that would delay EPA’s authority to implement these regulatory programs for one or two years, appropriation bills that would preclude funding for any EPA GHG regulatory initiatives, and promises to reverse any future EPA regulatory action through the Congressional Review Act. While such initiatives would likely pass the House, whether they would get through the Senate and/or survive a Presidential veto is uncertain.

Separate from EPA’s efforts to control GHG emissions through the Clean Air Act, 2011 marks the first year that certain large sources (i.e., sources that emit 25,000 tons per year of GHGs measured as CO₂ equivalents) are required to report their annual GHG emissions under EPA’s GHG Reporting Rule. While the final rule has been in place since the end of 2009, EPA continues to modify a number of aspects of the rule. For example, in the middle of 2010, EPA proposed a rule that would govern what reported data could be considered confidential business information. Based upon comments that the proposed rule was not sufficiently protective, at the end of 2010, EPA published an interim final rule that waived the requirements to submit certain data and proposed a rule that would postpone requirements to submit such data until 2014.

Additionally, in a move that would significantly affect the rapidly expanding natural gas industry in Pennsylvania and across the Marcellus region, at the end of 2010, EPA issued its final GHG reporting rule for petroleum and natural gas systems. According to this rule, due to the unique characteristics of the industry, the definition of “facility” that will be required to report GHG emissions was expanded to include a wider range of operations that may be separated physically by large distances. In the case of natural gas production, the definition will require well pad operators to total all GHG emissions from all their well pads within a given hydrocarbon basin, a potentially significant endeavor.

Courts are also likely to weigh in on a number of climate change issues in 2011. First, the District of Columbia Circuit is poised to hear the dozens of actions that attempt to roll back EPA's GHG regulatory initiatives in 2010. In addition, the Supreme Court will hear argument in *American Electric Power v. Connecticut* ("AEP"), a case in which the Second Circuit Court of Appeals permitted several states and private entities to assert common law nuisance claims against large electric power producers based on their alleged contribution to global warming. Interestingly, any successful efforts in Congress to restrict EPA's GHG regulatory authority may preclude any arguments in the AEP case that EPA regulation has preempted the plaintiffs' claims.

States and other local governments will also likely see climate change activity in 2011. The Regional Greenhouse Gas Initiative continues to operate its regional cap and trade program for power plants in the Northeast, albeit with declining allowance prices. Both Pennsylvania and New Jersey have their own climate change statutes that resulted in the issuance of climate change action plans by their respective environmental agencies. With the political shift in both states, however, the fate of such plans is uncertain.

Against this uncertainty surrounding the regulation of GHG emissions, environmental groups and others will likely increase efforts to regulate and restrict high GHG emitters through stricter controls on other pollutants, such as sulfur dioxide. Accordingly, despite the absence of GHG regulation, the shift towards lower emitting fuels such as natural gas will likely continue in 2011 and thereby support the expanding natural gas industry in the Marcellus and other shale plays.

NATURAL GAS DEVELOPMENT IN THE MARCELLUS SHALE

by MARC E. GOLD and NEIL S. WITKES

The Pennsylvania Department of Environmental Protection ("PADEP") amended several regulatory programs in 2010 to regulate more closely the burgeoning Marcellus Shale natural gas play. Newly promulgated total dissolved solids discharge requirements established in 25 Pa Code Chapter 92, combined with cross-cutting changes to the Oil and Gas Wells Regulations in 25 Pa Code Chapter 78, resulted in more prescriptive standards that are intended to provide greater environmental protection in connection with natural gas development activities. PADEP is continuing to identify program element improvements that reach other elements of the regulatory scheme; most notably, PADEP plans to issue final guidance documents that would lift the air permitting exemption currently in place for oil and gas operations and address when commonly owned gas wells and compression facilities should be considered a single source for air permitting purposes, both of which may lead to more stringent controls and burdensome permitting requirements.

While PADEP continues to refine the regulatory requirements applicable to the development of natural gas reserves in Pennsylvania, the Delaware River Basin Commission ("DRBC") has imposed a drilling moratorium that will remain in place until the Commissioners adopt natural

gas development regulations. On December 9, 2010, the Commissioners authorized the issuance of draft regulations for public comment. The public comment period closes on March 16 and will include public hearings that are scheduled for February 22 and 24. The DRBC regulations are designed to supplement the state's regulations based on the belief that the unique features of the Upper Delaware River Basin require additional protections. The draft regulations seek to minimize landscape impacts from drilling and infrastructure development, protect ground and surface water quality, and establish leasehold development plans in order to coordinate the overall build-out of the region. While this is an ambitious undertaking, natural gas development cannot proceed until these regulations are finally adopted.

Many of the regulatory concepts adopted by PADEP have application to other industry sectors. For example, PADEP's single source guidance will include the Department's gloss on when industrial activities separated by some physical distance should nonetheless be considered a single source for purposes of air permitting. In addition, the potential for drilling in the Delaware River Basin will raise a series of new issues relating to land use controls, resource management and water quality. We have been involved in these issues on behalf of several clients and are working closely with the Marcellus Shale Coalition in developing and advancing important industry positions. Moreover, we have a very active practice before the DRBC, representing many clients on matters requiring DRBC approvals, which has proved helpful on the issues the DRBC has raised in connection with natural gas development in the Delaware River Basin.

In the litigation context, a significant question is emerging as to whether companies operating in the Marcellus Shale will face strict liability claims related to any alleged environmental harm. In a recent decision, a federal court declined to answer the question of whether the "fracking" of wells constitutes an abnormally dangerous activity, creating strict liability, irrespective of fault, for all damages caused by drilling in the Marcellus Shale. The question was raised at an early stage in the case proceeding, and the court declined to provide an answer until the factual record in the case is more fully developed. However, the court's unwillingness to dismiss the strict liability claim as a matter of law raises the possibility that Pennsylvania courts may be willing to extend liability for damages irrespective of fault and despite compliance with state-of-the-art procedures.

Liability for ultrahazardous activity under Pennsylvania law is generally determined by the court – not the jury. But the court's determination is based on an evaluation of six factors, including whether there is a high degree of risk of some harm to the person or property of another. Historically, Pennsylvania courts imposed strict liability for abnormally dangerous activity only in limited circumstances involving "blasting." The Pennsylvania courts have been unwilling to extend strict liability to activities not traditionally within its scope. Thus, the Pennsylvania courts have declined to label the following activities as abnormally dangerous: public fireworks; storage of water in a reservoir; handling firearms; application of pesticides; operation of a fire detection system in a high rise office building; and storage of gasoline in underground storage tanks. In a case that perhaps is the closest parallel, a Pennsylvania appellate court refused to label the transmission of gasoline in an underground pipeline as

abnormally dangerous, overruling a trial court decision that had labeled the activity as abnormally dangerous. The court relied on the fact, in part, that the pipeline existed before the residential development under which it ran, rather than the nature of the activity itself.

The consequence of labeling “fracking” and other activities as abnormally dangerous could have detrimental impacts on the development of the Marcellas Shale, and bears watching. Pennsylvania case law suggests that courts should not be willing to extend strict liability to “fracking” and other activity relating to the development of the Marcellus Shale.

AIR AND WASTE

by BART E. CASSIDY

During 2010, the U.S. Environmental Protection Agency (“EPA”) initiated several significant rulemaking efforts that are likely to result in the promulgation of final regulations during 2011. Among the more significant of these rulemakings, EPA is scheduled to finalize several stringent air quality regulations.

Pursuant to Section 112 of the federal Clean Air Act, EPA must finalize the regulation of hazardous air pollutants (“HAPs”) from various sources. Relevant to many sources in the region, EPA is likely to finalize its “replacement” HAP regulation for industrial and commercial boilers. These regulations will impose maximum achievable control technology (“MACT”) requirements for fossil fuel-fired combustion sources located at both major and non-major “area” sources of HAPs. Industry generally criticized EPA’s proposed new Boiler MACT regulations as imposing significant costs without corresponding environmental benefits. If promulgated in accordance with EPA’s proposed rule, this Boiler MACT regulatory package may result in substantial additional costs for many owners and operators of fossil fuel-fired boilers.

EPA is also poised to promulgate significant additional regulations applicable to air emissions from electric generating units. The proposed utility MACT would primarily address the control of mercury emissions, following the vacatur by the Circuit Court of Appeal for the District of Columbia of EPA’s prior mercury control regulation for the utility sector. The same Appellate Court also previously invalidated EPA’s regulations governing the interstate transport of criteria pollutants generated by electric generating units (known as the Clean Air Interstate Rule, or “CAIR”). EPA is therefore pursuing a replacement rule for CAIR, now known as the “Transport Rule,” designed to also limit emissions of sulfur dioxide and nitrous oxides from these facilities. EPA continues to re-evaluate its approach toward this rulemaking, but nonetheless hopes to finalize the Transport Rule during 2011.

EPA is also scheduled to finalize and promulgate its new regulation of air emissions from commercial and industrial solid waste incineration (“CISWI”) units. In conjunction with this air quality regulation, EPA is reevaluating the scope of its definition of “solid waste” for purposes of its CISWI air regulatory standards. EPA has proposed to substantially revise its characterization of solid waste for these purposes. Significantly, the combustion of many

materials previously beneficially used as fuels may now be regulated as solid waste incineration under these federal standards. Further, because of EPA's associated reconsideration of the definition of solid waste for these purposes, these federal rulemaking packages may consequentially impact solid waste regulatory programs at both the state and federal levels.

In accordance with a judicial directive and statutory standards, EPA is also scheduled to finalize its determination regarding regulation of the management and disposal of ash generated by the combustion of coal, including for electricity generation. This issue has received significant national attention, as interested stakeholders have argued strenuously in favor of alternative regulatory schemes. Various environmental interests have pressed for regulation of coal combustion ash as a hazardous waste; by contrast, electric generating facilities and energy consumers insist that coal ash can be safely managed and disposed as nonhazardous waste, and the regulation of this material as hazardous waste would result in unnecessary and exorbitant costs that would adversely affect all aspects of the economy. EPA's pending proposal would regulate the material as nonhazardous waste. Given the controversy surrounding this rulemaking dictates that the form of the final regulation cannot be confidently predicted.

NEW FEDERAL REGULATIONS REGARDING WATER INTAKE STRUCTURES

by BART E. CASSIDY

The U.S. Environmental Protection Agency ("EPA") intends to issue a significant rulemaking that will affect water intake structures. After years of litigation and attempted regulatory efforts, EPA reports that it is prepared to pursue regulation of specific rules governing water intake structures for industrial sources. The same or related rulemaking will also impact thermal discharges from these and other sources. Depending upon the quantity of water use and the existing technology employed by an industrial facility, requirements associated with best available technology for water intake structures could impose upon existing sources millions of dollars in additional costs. Further, strict limitations on thermal discharge may limit the alternative technologies available to these regulated sources.

CLEANUP AND PROTECTION OF OUR NATIONS WATERWAYS THROUGH REGULATION AND ENFORCEMENT WILL CONTINUE TO BE A PRIORITY IN 2011

THE CHESAPEAKE BAY

by BRYAN P. FRANEY

2011 will be a critical year for the implementation, refined planning, and even litigation over the Chesapeake Bay Total Maximum Daily Load ("TMDL"), which the U.S. Environmental Protection Agency ("EPA") refers to as a "historic and comprehensive pollution diet" potentially affecting numerous businesses, developers, farms, municipalities and individuals in the Chesapeake Bay watershed. At the end of 2010, EPA established the Chesapeake Bay TMDL to

limit releases of nitrogen, phosphorus, and sediment to the Chesapeake Bay. According to EPA, these pollutants can “cause algae blooms that consume oxygen and create ‘dead zones’ where fish and shellfish cannot survive, block sunlight that is needed for underwater Bay grasses, and smother aquatic life at the bottom.” The TMDL was prompted by the failure of multiple restoration efforts over the last 25 years and the continued poor water quality in the Chesapeake Bay and its tributaries.

The Chesapeake Bay TMDL covers a 64,000 square mile watershed, including seven different jurisdictions: Pennsylvania, Maryland, Virginia, West Virginia, Delaware, New York and the District of Columbia. The TMDL sets limits that reduce nitrogen by 25 percent, phosphorus by 24 percent and sediment by 20 percent. Each jurisdiction is responsible for a defined share of the pollution reductions and must ensure that all pollution measures necessary to meet these limits are in place by 2025, with at least 60 percent of the necessary measures in place by 2017.

To demonstrate how they intended to meet the pollution limits, the jurisdictions were required to develop a Phase I Watershed Implementation Plan (“WIP”). The Phase I WIPs subdivided the Chesapeake Bay TMDL allocations among point sources (e.g., wastewater treatment plants, stormwater discharges associated with construction activity, municipal stormwater separate sewers) and non-point sources (e.g., agriculture, unregulated stormwater) of nitrogen, phosphorus, and sediment. The Phase I WIPs were also required to include reasonable assurances that the jurisdiction could achieve and maintain the pollution reductions, particularly from unregulated non-point sources.

In 2011, each of the jurisdictions in the watershed will begin, or continue, efforts to implement the measures identified in the Phase I WIPs. The Phase I WIPs identify hundreds of potential measures that impact farming practices, construction activity, discharges from wastewater treatment plants, and management of stormwater. Also during 2011, the jurisdictions will begin developing Phase II WIPs. The Phase II WIPs will establish local pollution targets and provide further detail on how the jurisdiction intends to meet its TMDL allocation. As with the Phase I WIPs, the Phase II WIPs will be developed with public input and we encourage all potentially affected constituents to engage in the planning process.

Lastly, 2011 will be an important year for litigation related to the Chesapeake Bay TMDL. On January 10, 2011, the American Farm Bureau Federal filed a lawsuit against EPA challenging the EPA’s authority to implement the Chesapeake Bay TMDL. The suit argues, among other things, that EPA exceed its authority in establishing the TMDL (typically a state led process) and that EPA relied on flawed data and a flawed model in developing the TMDL allocations. Affected real estate developers, municipalities, and other agricultural interests have raised similar concerns and may also seek to challenge the TMDL in 2011. Nonetheless, EPA and the seven Chesapeake Bay jurisdictions intend to move forward with implementation of the TMDL and development of the Phase II WIPs.

THE SPECTER OF SEDIMENTS

by JOHN F. GULLACE

Beneath the murky waters of the Nation's industrial waterways lays unprecedented environmental liabilities that little more than a decade ago very few businesses, municipalities or property owners gave much thought to – contaminated sediments. Sediments sites are becoming increasingly common and are not confined to any one region of the country: Lower Duwamish Waterway, Seattle, WA; Portland Harbor, Portland, OR; Lower Fox River, Northeastern, WI; Buffalo River, Western, NY; Onondaga Lake, Central, NY; Gowanus Canal, New York, NY; Hudson River PCB Superfund Site; and the Diamond Alkali Superfund Site which includes the Lower Passaic River Study Area and Newark Bay sites in Northern, New Jersey, to name a few. The contaminated sediments at these sites are often the legacy of more than a century of industrialization and development. Sources of contamination over the decades commonly include industrial discharges, storm water discharges, storm water runoff, combined sewer overflows, municipal wastewater systems and even air deposition. The contaminants at issue vary, but often involve some combination of dioxin, PCBs, heavy metals, VOCs and PAHs. The federal and state partnerships that drive the investigation and remediation of these sites often add complexities, particularly once you factor in the state and federal natural resource trustees that invariably are involved. The remedial investigations, natural resource damages assessments, remediation, natural resource restoration and compensation for these sites can easily run into the billions of dollars. These sites are also large and technically complex.

At MGKF we are involved at several sediments sites, in multiple jurisdictions, on behalf of a very diverse array of clients, and we are familiar with the complexities of working with state and federal agencies during investigation and cleanup activities as well as dealing with the myriad of state and federal natural resource trustees involved at these sites such as the U.S. Fish and Wildlife and the National Oceanic and Atmospheric Administration. Supplementing our experience with sediments sites is our long history of representing clients and coalitions in the development and implementation of watershed-wide TMDLs.

Almost anyone can become involved in a sediments site. Direct industrial dischargers along a river are easy targets, as are municipalities with storm water, sanitary and industrial discharges to a waterway. Equally, however, we have seen indirect dischargers ensnared in these cases, or even businesses that are not contiguous to the waterways in question, but may have had contaminated runoff that could have reached the waterways in question. Since responsibility for these sites can go back a century or more, successor liability is tremendously important. Operations conducted on your site a hundred years ago can also come back to haunt you. Since a political solution to these tremendously expensive sites seems unlikely anytime soon, and the web of liability is being spread broadly, anyone near an impacted waterway needs to be cognizant of the liability and costs that may be coming down the river.

2011 REGULATORY GUIDANCE AND POLICY INITIATIVES EXPECTED TO BE A POSITIVE IMPACT ON DEVELOPMENT

RENEWABLE ENERGY PROJECTS

by BRETT E. SLENSKY

Federal and state policies should continue to create an advantageous environment for renewable energy project development in 2011. At the federal level, the U.S. Treasury's Grant in Lieu of Tax Credit program, one of the [key federal financial incentives for renewable energy](#), has been extended to December 31, 2011. In addition, despite the results of the 2010 midterm elections, the enactment of a federal clean energy standard, which could be structured much like the Renewable Energy Portfolio Standards ("RPS") currently in place in more than half the states, is a possibility. Such a standard would likely further promote the development of renewable energy and may also provide additional federal incentives or funding for these projects.

In New Jersey, the state legislature has already passed, and is considering a number of other bills that if passed, would continue to promote the growth of renewable energy in that state. By way of example, Assembly Bill 3139 permits the development of solar energy systems on closed landfills and quarries, and Senate Bill S-2371 could increase the ability of certain projects to attract financing by creating long-term price certainty for the project's Solar Renewable Energy Credits ("SRECs"). Moreover, New Jersey's SREC market should continue to support high SREC prices, which would lead to lower relative payback periods, as the state's RPS solar generation requirements far exceed the state's current solar generation capacity. The New Jersey Clean Energy Program also entered the year with an approximate budget of \$141 million for various renewable energy grant and loan programs.

In Pennsylvania, although the incoming Corbett administration's renewable energy priorities are uncertain at this point, the Governor's stated desire to enhance alternative energy investment in Pennsylvania could lead to targeted legislative initiatives and renewable energy funding opportunities later this year.

NEW JERSEY LSRP AND SITE REMEDIATION REFORM

by BRUCE S. KATCHER

2011 will be a very important year in the development of the reforms contemplated by the New Jersey Site Remediation Reform Act ("SRRA"). Several of the key developments and their anticipated impacts are described below.

Transition to LSRP Oversight. Enacted in May 2009, the centerpiece of SRRA, the new licensed site remediation professional ("LSRP") program, will be entering the final transition stages to replace NJDEP oversight with LSRP oversight for all cases, which by law must occur by May 2012. Therefore, parties with existing cases which have not yet opted-in to the LSRP program

have some critical planning issues facing them in 2011 year concerning whether and when to opt-in and who to retain as their LSRP. A few of our clients have opted-in to the program with their existing cases, however, a large number have delayed doing so pending the further development of the requirements for LSRP licensing and the substantive changes to the remediation process. Time is running out.

LSRP Licensing. Approximately 435 temporary LSRP licenses have been issued by NJDEP, which had expected to have issued approximately 1000 licenses by now; however, the number of applications was far fewer than expected. Whether this will increase in 2011 and whether this lesser number of LSRPs will be able to handle the workload as cases opt-in to the LSRP program prior to May 2012 remains to be seen.

The LSRP Board, the body established by SRRA to regulate LSRP licensing and conduct, held its initial meetings in late 2010 and is expected to be developing regulations to govern its activities during 2011. For parties performing remediations, the Board's activities bear close watching as they begin to set up the processes under which the Board will oversee LSRP conduct, including the handling of complaints and license suspension and revocation.

In addition to these regulations, high on the list of the Board's activities will be the development and administration of an LSRP licensing exam which all applicants for the final LSRP licenses to be issued by the Board (to replace the temporary licenses being issued by NJDEP while the Board is set up), will be subject to. The exam will be prepared by a contractor and is expected to be in place by the beginning of 2012. This process will create an additional hurdle for consultants considering LSRP status and may further affect the number of LSRPs available to handle new and existing cases as the latter opt-in to the program.

New Regulations and Guidance. On the NJDEP regulatory front, the agency will be proposing new regulations to replace the interim regulations adopted under SRRA in November of 2009 which are scheduled to expire in May 2011. The interim regulations repealed the site remediation program's oversight rules and adopted a new set of Administrative Requirements for the Remediation of Contaminated Sites ("ARRCS") and revisions to the Technical Requirements for Remediation of Contaminated Sites ("Tech Regs"), the Industrial Site Recovery Act ("ISRA") regulations, the Underground Storage Tank ("UST") regulations and the remediation standards to make those regulations consistent with the new requirements of SRRA. Many draft guidance documents were also released to address program implementation.

NJDEP recently released drafts of its proposed changes to the ARRCS, ISRA and UST rules for stakeholder comment prior to developing a rule proposal. The Tech Reg revisions are still being drafted, with input from a stakeholder group, and are expected to make major modifications in the Tech Regs to make them performance based, remove the detailed prescriptive procedural elements and move the focus to the exercise of professional judgment by LSRPs. Many new guidance documents are being developed and draft guidance updated to provide additional information on how to meet the performance objectives. The proposed regulations and the

guidance documents are expected to be made available during the first half of 2011 and final regulations are expected to be in place by May 2012.

These regulatory changes and guidance documents will address topics including groundwater and soil remediation, vapor intrusion (a major modification of the 2005 vapor intrusion guidance document is in the works), remedial action permits, historic fill and diffuse anthropogenic background, ecological evaluation, immediate environmental concerns, free product, clean fill and presumptive remedies. They will provide the substantive requirements under which the LSRP program will operate and will likely transform the process and standards applicable to site remediations in New Jersey. We will continue to follow their progress and provide periodic update reports during the course of the year.

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