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AN ENVIRONMENTAL AND ENERGY LAW PRACTICE

2016 Environmental and Energy Law Forecast

FEDERAL FORECAST

Federal Environmental Enforcement in 2016

Carol F. McCabe, Esq.

Following its fiscal year 2015 environmental enforcement efforts, during which EPA secured $404 million in civil and administrative penalties and criminal fines and $7 billion in commitments to control pollution and remediate contaminated sites, EPA will continue in 2016 to focus its enforcement efforts on reducing air pollution from the largest sources, cutting air toxics emissions from flares and equipment leaks, and assuring that energy extraction and production activities comply with environmental laws. Other priorities are reducing pollution from mineral processing operations, keeping raw sewage and contaminated stormwater out of our nations' waterways, and preventing animal waste from contaminating surface and groundwater. With limited resources, EPA is expected to focus on complex, high profile cases that will result in reduced impacts to public health. EPA remains committed to using its Next Generation Compliance tools to enhance the impact of enforcement settlements, including the use of advanced monitoring techniques, electronic reporting and public transparency of compliance data. These tools have the potential to significantly change the nature of regulated facilities' compliance obligations and communications with agencies and the public. For a fuller discussion of what EPA's 2016 enforcement efforts may bring, see the January 8, 2016 environmental column of the *Legal Intelligencer* entitled, "EPA's Environmental Enforcement: What Will 2016 Bring?"

Significant Changes to Federal Hazardous Waste Generator Requirements in 2016?

Rodd W. Bender, Esq. and Brett E. Slensky, Esq.

Several important federal rulemaking packages that are anticipated to dramatically alter the regulatory landscape governing the hazardous waste generator requirements could be finalized in 2016. These proposed rules include the "Hazardous Waste Generator Improvements Rule" (80 *Fed. Reg.* 57918, Sept. 25, 2015), which included substantive changes to virtually every aspect of the generator program and proposed a significant reorganization of the federal regulations (a detailed discussion of this proposed rule is available here), and the "Management Standards for Hazardous Waste Pharmaceuticals" rule (80 *Fed. Reg.* 58014, Sept. 25, 2015), which proposed additional substantive changes to the regulatory framework governing the management and disposal of hazardous waste pharmaceuticals. EPA received a significant amount of public comments on both proposals during the respective public comment periods, which both closed on December 24, 2015. Based on this public interest and the ramifications for the regulated community associated with these rule proposals (most states, including Pennsylvania and New Jersey, incorporate these requirements by reference), their progression through the administrative review process will be closely followed in 2016.

Turmoil Surrounding the New Federal "Clean Water Rule" to Continue in 2016

Jonathan E. Rinde, Esq.

On June 29, 2015, the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency announced final regulations that revised the regulatory definition of the phrase "waters of the United States." The revised definition would bring many more areas within federal permitting jurisdiction, through the federal Clean Water Act's Section 404 wetlands permitting program and Section 402 discharge permitting program. A number of lawsuits opposing the new regulations, filed by both industry groups and states, caused the Sixth Circuit to stay the application of the new regulations, prohibiting its use in federal permitting and enforcement actions. Given the amount of rancor the new regulations caused, it could be a long time before any revision to the definition of the phrase "waters of the United States" becomes effective.

Emergency Demand Response Provisions to Change for Emergency Generators

Katherine L. Vaccaro, Esq.

The federal regulatory provisions allowing emergency stationary reciprocating internal combustion engines (RICE) to participate in demand response programs for up to 100 hours per year are set to change by May 1, 2016, following the D.C. Circuit Court of Appeal's recent decision striking down these provisions. RICE are used in industry to drive process equipment, and certain types of RICE, known as backup generators, are used for standby power generation – in some cases as part of emergency demand response programs. The "100-hour allowance" enables owners of emergency RICE to participate in capacity markets as demand-response resources without having to install pollution controls to meet the more stringent emission standards that apply to non-emergency engines. We do not know yet what the "new" RICE rule will look like; EPA could seek to introduce some scaled-back version of the current demand response provisions or elect to do away with them altogether. Either way, we know the 100-allowance has a finite shelf life. Therefore, current emergency RICE owners who want to ensure they can continue to participate in demand response programs beyond May 2016 should start thinking about whether they need to install additional pollution controls, as this process can easily take up to a year or longer. And since the 100-hour allowance provisions are among the key compliance demonstration requirements for all emergency RICE, even engine owners not directly affected by the Court's ruling should start thinking about whether their air permits will eventually need to be modified to reflect the forthcoming changes to these provisions. For a fuller discussion of the RICE rule, see the September 11, 2015 environmental column in the *Legal Intelligencer*: Emergency Demand Response Provisions of EPA's RICE Rule.

Changes to Federal Threatened and Endangered Species Rules May Affect Developers and Dischargers

Michael Dillon, Esq.

On January 14, 2016, the United States Fish and Wildlife Service (FWS) published a rule pursuant to Section 4(d) of the Endangered Species Act (ESA) that provides significant protections to the Northern Long-Eared Bat (81 Fed Reg. 1900), a species of bat the FWS had previously listed as "threatened" in April 2015. The rule imposes restrictions on the nature and types of activities that may occur in locations where White Nose Syndrome (WNS) – a fungal disease that affects hibernating bats and has resulted in widespread impact to Northern Long-Eared Bat populations in North America – has been identified. The area where WNS has been found includes most of the Eastern United States, including all of Pennsylvania, New Jersey, and Delaware. In these areas, "incidental take" of Northern Long-Eared Bats – that is harm, harassment or mortality to the species that may occur incidental to an otherwise lawful activity – is

prohibited within a known hibernation site of the threatened bats. Perhaps more significantly, the rule also prohibits incidental take associated with all tree clearing activities within one quarter-mile of a known hibernation site, and from tree clearing activities that would remove or destroy known "occupied maternity roost trees" – trees to which female or juvenile bats have been linked – and trees within 150 feet of known occupied maternity roost trees between June 1 and July 31 of each year. Given these protections, any project in Pennsylvania, New Jersey, and Delaware that would require tree removal or disturbance may be impacted by this rulemaking.

In May of this year, the National Marine Fisheries Service (NMFS) is expected to publish a proposed rule identifying critical habitat for Atlantic Sturgeon, an anadromous fish species that NMFS listed as endangered in 2012. Populations of Atlantic Sturgeon have been linked to the Delaware River, and NMFS is expected to include sections of the Delaware in its critical habitat rule. Individuals who conduct activity in the Delaware should follow the rulemaking and consider submitting comments on the proposal to NMFS.

GAO Expected to Issue Report on EPA Handling of "Mega" Superfund Sites Later this Year

John F. Gullace, Esq.

On May 28, 2015, the United States Senate Committee on Environment and Public Works requested a Government Accountability Office (GAO) investigation of EPA's handling of "mega" Superfund sites. Senators Inhofe and Rounds wrote to GAO that they are "concerned that EPA Regions may no longer be complying with policies, guidance, and procedures that were intended to improve the timeliness, cost-effectiveness, consistency, and quality of sediment site cleanups." Accordingly, they requested that "the GAO review EPA's efforts to clean up sites with contaminated sediments, with a particular focus on "mega" sites where the expected cleanup costs will exceed $50 million." The GAO review began shortly after the request was made and a report is expected later this year.

Senate Vote Advances Efforts to Enact First Major Reform to the Toxic Substances Control Act of 1976

Nicole R. Moshang

On December 17, 2015, the U.S. Senate considered legislation previously approved by the House (H.R. 2576, entitled the "TSCA Modernization Act of 2015"), and in an unanimous vote passed H.R. 2576, as amended by the Senate with the text of Senate bill 697, entitled the "Frank R. Lautenberg Chemical Safety for the 21st Century Act" (S. 697). The two versions of the Toxic Substances Control Act (TSCA) reform legislation passed in the House and Senate will now need to be reconciled by Congress in conference committee before a final version can be sent to President Obama for approval, which is expected to occur in 2016. At this time, however, it is uncertain whether the final reform legislation sent for approval will look more like the 211 page Senate bill (S. 697) or the 46 page House version (H.R. 2576), which is much narrower in scope.

Regardless of the final version presented for approval, the reform legislation will be the first major amendment to TSCA since its enactment in 1976, and is expected to give EPA more authority to obtain new information on all chemical substances in the U.S. commerce, require new safety testing of both new and existing chemicals, and establish standards for prioritizing chemicals to determine their safety. The final legislation is also expected to establish a Scientific Advisory Committee to provide independent scientific advice to EPA and require EPA to develop guidelines and implementing regulations within two years of enactment.

PENNSYLVANIA FORECAST

Is More Pre-Enforcement Review of PADEP Penalty Proposals Now Available?

Diana A. Silva, Esq.

Just days before the New Year, the Pennsylvania Supreme Court ruled that a private party could initiate a declaratory judgment action in the Pennsylvania Commonwealth Court to challenge a penalty assessment proposed by PADEP. EQT Production Co. filed a lawsuit to challenge PADEP's interpretation of the Clean Streams Law, which PADEP argued allowed it to recover $10,000 for each day that residual contamination caused by a leaking fracking water impoundment remained in the ground – even though PADEP had not yet imposed the proposed penalty on EQT. In the normal course, a party is required to wait until PADEP actually levies a penalty or takes another enforcement action before that party can challenge the action before the Environmental Hearing Board, since administrative appellate rights are limited to appeals of "final agency actions." The *EQT Production* case has added a wrinkle to the standard procedure for challenging administrative actions in Pennsylvania, and provides a potential new avenue for legal challenges to PADEP's proposed actions. The decision may also influence how the Department presents proposed settlements to members of the regulated community moving forward. A complete summary of the case can be found on our litigation blog.

Revised Pennsylvania Oil and Gas Regulations Expected to be Finalized in 2016

Todd D. Kantorczyk, Esq.

On January 6, 2016, the Pennsylvania Department of Environmental Protection released its Final Regulations for Oil and Gas Surface Activities. The release of the final regulations is the latest step in a process that began in 2010 as an effort to revise these regulations to address more specifically the expansion of oil and gas exploration and production activities in Pennsylvania associated with the Marcellus Shale formation.

The final regulations incorporate changes required by Act 13 of 2012 as well as other rules that the Department believes are necessary to address "gaps" identified through reviews of the current Pennsylvania regulatory program. Highlights include:

- Separate regulations applicable to "conventional" oil and gas operations and "unconventional" oil and gas operations (i.e., shale drilling that requires the combination of horizontal drilling and high volume hydraulic fracturing);
- Allowing the Department to consider and protect "public resources" (such as schools, playgrounds, and critical habitat communities) as part of the well permitting process;
- Requiring operators to identify abandoned or orphaned wells within a certain radius before hydraulic fracturing begins;
- Mandating secondary containment for all regulated substances at unconventional well sites;
- Subjecting centralized storage impoundments to residual waste permitting requirements; and
- Prohibiting the use of temporary waste storage pits at unconventional well sites.

The Environmental Quality Board is scheduled to consider these regulations at its February 3, 2016 meeting, after which the regulatory package will move on to the Independent Regulatory Review Commission and then the Environmental Resources & Energy committees in the House and Senate. The Department believes that this process may conclude by summer 2016, but both the conventional and unconventional gas industry have raised significant objections to the new rule, in particular the additional

costs for what the industry believes are questionable benefits. Between the industry objections and the ongoing budget disputes in Harrisburg, it is possible that this rulemaking will continue to drag on through 2016.

Pennsylvania EHB Upholds DEP Aggregation Determination – May Affect Source Aggregation in the Future

Todd D. Kantorczyk, Esq.

At the close of 2015 the Pennsylvania Environmental Hearing Board (EHB) upheld the Pennsylvania Department of Environmental Protection's decision to treat a natural gas well pad and nearby compressor station as a single emissions source for air permitting purposes (*National Fuel Gas Midstream, et al. v. Commonwealth of Pennsylvania*, EHB Docket No. 2013-206-B). While source aggregation issues have been a hot button issue for natural gas operations for some time, the principles the EHB applied in this matter have the potential to affect other industries where source aggregation may be in play in the coming year and beyond.

Under federal and state regulations, two activities qualify as a single emission source if the pollutant-emitting activities: (1) belong to the same industrial grouping; (2) are under common control; and (3) are located on contiguous or adjacent properties. In this instance, the EHB first held that the well pad and compressor station belonged to the same industrial grouping, with the compressor station falling under Oil and Gas Field Services because operation of the compressor engines constituted the primary polluting activities.

Next, the EHB found that the well pad and the compressor station were under common control because they shared a corporate parent that had approval over the operating and capital budgets of the two subsidiaries. Notably, the EHB declined to apply the general definition of "control" used by the Securities and Exchange Commission and referenced by the United States Environmental Protection Agency in the applicable regulatory preamble. At the same time, the EHB noted that it would have been very difficult to establish common control through a contractual or support/dependency standard that has been argued in other circumstances.

Finally, the EHB found that the two operations were "adjacent" because the boundaries of the two developed parcels were 0.24 miles apart. While this distance fell within the Department's quarter-mile "rule of thumb" set forth in official guidance, the EHB explicitly noted that it was not bound by Department guidance on this point. Indeed, in his concurring opinion Judge Labuskes went so far as to say that the Environmental Rights Amendment in Article 1, Section 27 of the Pennsylvania Constitution (i.e., the Environmental Rights Amendment) provides sufficient authority for the Department to treat multiple sources as a single facility "[r]egardless of what the complex regulations governing air quality might otherwise require."

At a minimum, going forward the EHB's decision in this matter opens up new avenues of analysis for the Department and may require additional planning for entities evaluating issues related to single source aggregation for air permitting purposes.

Finalization of Governor Wolf's Pipeline Infrastructure Task Force Report Expected Soon

Jonathan E. Rinde, Esq.

Following six months of meetings, work groups and public involvement, Governor Wolf's Pipeline Infrastructure Task Force is prepared to issue its final report in February 2016. The Report will contain a host of recommendations, for both industry and PADEP to consider in order to make the siting, permitting, construction and operation of natural gas pipelines in Pennsylvania environmentally sound and transparent to the public. PADEP may also use the recommendations to develop new policies or propose new regulations that could affect other industries statewide.

Army Corps Proposes Changes to Pennsylvania State Programmatic General Permit for Wetlands Loss of Less than 1.0 Acre

James M. McClammer, Esq.

This past fall, the U.S. Army Corps of Engineers (the "Corps") announced a draft Pennsylvania State Programmatic General Permit No. 5 (PASPGP-5) and provided a 30-day public comment period on the draft permit, which ended October 29, 2015. The PASPGP program is a general Section 404 permit under the federal Clean Water Act which is issued by the Corps on a Pennsylvania-wide basis for activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment, including wetlands. Generally, projects that result in the loss of less than 1.0 acre of wetlands are eligible for a PASPGP permit; otherwise, the project must obtain an individual or nationwide Section 404 permit. Under the PASPGP program, a Joint Permit Application is submitted to the Pennsylvania Department of Environmental Protection (PADEP), which determines – in accordance with the requirements of the PASPGP program – whether it must forward a copy of the application to the Corps for review, or whether it can issue the PASPGP permit itself without Corps review.

If adopted, the draft PASPGP-5 permit would replace the current PASPGP-4 permit, which is set to expire on June 30, 2016. The draft PASPGP-5 contains several significant changes from the PASPGP-4, including the following: (1) single and complete projects resulting in a permanent loss of more than 1,000 linear feet of stream would no longer be eligible for a PASPGP permit; (2) post-construction monitoring requirements would be required for temporary impacts to wetlands that exceed 0.10 acre, unless waived by the Corps; and (3) proposed changes to the activities that would be required – and not required – to be reported by DEP to the Corps for processing.

The majority of Section 404 authorizations issued in Pennsylvania are through the PASPGP program, so it is important for developers of residential, commercial, or industrial facilities in Pennsylvania to understand the parameters of the PASPGP program.

Additional information on this topic can be found here.

Update to PA Act 2 Regulations Expected in First Half of 2016

Michael M. Meloy, Esq.

Proposed changes to the regulations implementing the Pennsylvania Land Recycling and Environmental Remediation Standards Act (Act 2) were issued for public comment on May 17, 2014. The proposed regulations include numerous changes to the numeric cleanup standards for soils and groundwater under the statewide health standard. The proposed regulations also include important revisions regarding the public notice process associated with the submission of plans and reports to the Pennsylvania Department

of Environmental Protection. The comment period regarding the proposed regulations has closed and the proposed regulations are expected to be finalized in the first half of 2016. The new regulations, particular the changes to cleanup standards, are likely to have important consequences for remediation and brownfields projects.

Fundamental Changes to PA Vapor Intrusion Guidance Likely to Go Final in 2016

Michael M. Meloy, Esq.

The Pennsylvania Department of Environmental Protection (PADEP) is in the process of overhauling Pennsylvania's current vapor intrusion guidance document issued 2004. PADEP, in conjunction with the Cleanup Standards Scientific Advisory Board (CSSAB), has been evaluating changes in the manner in which vapor intrusion issues have been addressed over the past decade and the evolving science associated with vapor intrusion. PADEP issued a new vapor intrusion guidance document in proposed form on July 25, 2015. The public comment period regarding the proposed vapor intrusion guidance document closed on September 23, 2015. The proposed vapor intrusion guidance document makes fundamental changes in the way that vapor intrusion issues are currently being handled. In general terms, criteria associated with vapor intrusion are more stringent and the options for addressing vapor intrusion are more limited under the proposed vapor intrusion guidance. The proposed vapor intrusion guidance is expected to be finalized in 2016 and will have important ramifications for sites where volatile regulated substances are present.

Proposed Changes to PA Management of Fill Policy Could Adversely Impact Completed Projects and Future Availability of Clean Fill

Michael M. Meloy, Esq.

On December 20, 2014, the Pennsylvania Department of Environmental Protection (PADEP) issued proposed changes to Pennsylvania's Management of Fill Policy (also known as the Clean Fill Policy). In particular, PADEP proposed to revise numeric standards used to evaluate whether fill materials qualify as "clean fill" and to alter the sampling protocols that are to be followed. In many instances, the proposed numeric standards are lower than the current numeric standards. Changing the numeric standards for "clean fill" has broad consequences for projects that have already been completed in reliance on the existing standard and projects that are in the planning phases. Certain of the proposed numeric standards are so low that it will be difficult to find materials in many portions of Pennsylvania that qualify as "clean fill." PADEP received extensive public comments on the proposed changes and has been considering how to proceed. It is likely that PADEP will finalize changes to the Management of Fill Policy in 2016. These changes will have significant importance for infrastructure projects, land development projects, brownfields projects, utility projects, and any other projects that involve earth disturbance activities.

NEW JERSEY FORECAST

NJ Legislature Fails to Pass Legislation Insulating Local Public Entities from Spill Act Claims, But the Effort May Continue in 2016

John F. Gullace, Esq.

In the last legislative session, the New Jersey Senate and Assembly both passed bills that would have insulated local public entities from Spill Act claims for cleanup and removal costs brought by private parties, but the bills were not identical at the conclusion of the session and therefore did not go to the Governor. Similar legislative efforts to protect local public entities from Spill Act liability have failed in the past and the fate of any such legislation if sent to the Governor is uncertain. The Assembly has already reintroduced its version of the bill in the current session of the legislature and the progress of this legislation should be watched closely by anyone who might have a Spill Act claim against a municipal entity now, or in the future, including claims related to contaminated waterways.

New Jersey 2016 Remedial Investigation Report Deadline

Christopher D. Ball, Esq.

New Jersey's Site Remediation Reform Act (SRRA), enacted in 2009, requires any person responsible for conducting a remediation of a discharge identified (or which should have been identified) prior to May 7, 1999 contamination to complete an entire site remedial investigation (RI) within five years of the enactment of SRRA or be placed under the direct oversight of the New Jersey Department of Environment Protection (NJDEP). The five-year anniversary of the SRRA expired in May of 2014, and numerous older sites with incomplete RIs could have been subjected at that time to NJDEP direct oversight but for legislation that was passed in 2013 authorizing a two-year extension of the deadline for sites that applied for the extension by March of 2014 and met certain specified requirements. For NJ sites that previously applied for and received the extension, the RI deadline is now approaching again and will expire on May 7, 2016. This is a statutory deadline. Barring any additional legislative extension, failure to meet the deadline will result in NJDEP, rather than the Licensed Site Remediation Professional, overseeing all site remediation activities and selecting the remedial action, and will also require the responsible party to: (1) prepare a feasibility study evaluating alternative remedial actions; (2) establish a trust fund for the full cost of the remedial action, and (4) implement a public participation program for the site. Review past MGKF alerts for more information on the RI deadline and the 2014 extension.

Proposed NJ Flood Hazard Act Rules May Face a Legislative Veto

Christopher D. Ball, Esq.

2015 saw major revisions proposed to New Jersey's Flood Hazard Area Control Act rules, Coastal Zone Management rules, and Stormwater Management rules. The rule amendments were billed by the New Jersey Department of Environmental Protection (NJDEP) as comprehensive changes to the rules to "reduce unnecessary regulatory burden, add appropriate flexibility, provide better consistency with Federal, local, and other State requirements, and address implementation issues." The rule changes consolidated permitting requirements between the three programs and removed certain regulatory burdens such as the 150-foot riparian zone regulatory standard for development in areas containing acid-producing soils. The proposal received criticism from State environmental groups, and on January 11, 2016, the Legislature voted to block the rule changes. The NJDEP Commissioner is currently working within a thirty-day window to amend or withdraw the proposed rules or the Legislature may, by passage of a concurrent resolution,

invalidate the proposal. The resolution of this issue is worth watching as the proposed rule changes will have a direct impact on development throughout the State.

Proposed Revisions to New Jersey Water Quality Management Planning Rules Likely to Be Finalized in 2016

Bruce S. Katcher, Esq.

Major revisions to New Jersey's Water Quality Management Planning (WQMP) Rules, initially proposed by NJDEP in October 2105, should be finalized during 2016. These revisions are aimed primarily at addressing problems associated with the requirements imposed by the 2008 version of the WQMP rules that required all wastewater management planning agencies to submit updated wastewater management plans by April 2009 (later administratively extended to 2011). Because many planning agencies were late in submitting or did not submit these plans and the rules did not allow for site specific plan amendments on a case-by-case basis, development which was required to be consistent with existing the existing WQMP as a precondition to issuance of other NJDEP permits and approvals could not proceed and existing wastewater sewer service area designations in areas covered by non-compliant planning agencies were withdrawn. This was partially rectified by the Legislature in 2012 and 2013, which enacted legislation allowing site specific amendments in areas where there up-to-date WQMPs did not exist, however that legislation expired on January 17, 2016. The newly proposed rules would update the WQMP planning process to facilitate the adoption of up-to-date plans and would allow site-specific amendments while this process was taking place. They would also make changes to other requirements, including provisions on threatened and endangered species habitat and natural heritage sites, which have been controversial. The comment period on these regulations ended in December and the regulations should be finalized by October 2016.