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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.

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