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AN ENVIRONMENTAL AND ENERGY LAW PRACTICE

2018 Environmental and Energy Law Forecast

Manko, Gold, Katcher & Fox takes a look at some of the key issues to watch in 2018 at the federal level and at the state level in Pennsylvania and New Jersey.

FEDERAL FORECAST

The Trump Administration and EPA

Carol F. McCabe, Esq. and Claudia V. Colón, Esq.

When President Trump took office last January, he announced aggressive goals affecting federal environmental law and policy, including deregulation, energy independence, economic growth and streamlined permitting. How did the administration fare in 2017, and what can we expect for 2018? While the administration highlights its deregulatory successes, many aspects of its environmental agenda have drawn strong opposition from environmental advocacy groups and certain states. The administration has taken steps toward significant rollbacks, including the proposed repeal of the Obama administration's Clean Power Plan, and the proposed revision of the "Waters of the United States" ("WOTUS") rule. In inviting public comment on these and other regulatory actions, EPA has made its legal and policy case. For example, the administration estimates that repeal of the Clean Power Plan is consistent with EPA's legal authority under the Clean Air Act, and will eliminate up to $33 billion in compliance costs as of 2030. In reviewing and revising the WOTUS Rule, EPA seeks to minimize regulatory uncertainty while providing due deference to the states' role in carrying out the goals of the Clean Water Act.

The current administration's push to roll back environmental regulations has not been entirely smooth. For example, back in July, the Clean Air Council successfully challenged Administrator Pruitt's attempt to temporarily suspend oil and gas methane emission standards promulgated in 2016, which include methane leak detection and repair requirements, pending reconsideration of the rule. The U.S. Court of Appeals for the D.C. Circuit in *Clean Air Council, et al. v. Scott Pruitt*, No. 17-1145 (D.C. Cir. July 3, 2017), found that Pruitt lacked authority to stay the rules in the absence of a required (rather than discretionary) reconsideration under the Clean Air Act. EPA has proposed a longer-term delay of the standards pending completion of its reconsideration process. The proposed delay has been subject to public notice and comment and is being watched very closely by industry and environmental groups alike.

EPA faces significant budget and personnel reductions, in furtherance of the administration's goal of defining the appropriate federal role of environmental protection while supporting the agency's focus on core statutory work. President Trump's proposed EPA budget for FY 2018 is $5.65 billion, $2.6 billion less than the FY 2017 budget for the Agency, and carries with it steep program cuts and job eliminations. While the administration has promoted cooperative federalism between the federal government and states and tribes, these budget cuts signify a potential strain on state environmental programs that have been funded at least in part by EPA. On the enforcement front, however, EPA has pledged to work closely with states to

promote compliance and to address environmental violations, with delegated states taking the enforcement lead in most cases.

At the beginning of his tenure, Administrator Pruitt signaled his interest in efficient site cleanups, and EPA indeed focused a fair amount of attention on the Superfund program in 2017. In May, Administrator Pruitt issued a memorandum directing agency management to prioritize the Superfund program, and created a Superfund Task Force charged with reviewing the status of the program with the goal of expediting cleanups, reinvigorating efforts by potentially responsible parties, encouraging private investment to facilitate cleanup, promoting redevelopment, and engaging with stakeholders. The Task Force issued a report of its findings in July, which called for the identification of sites to be placed on a high priority list that will be targeted for immediate and intense attention directly from Administrator Pruitt. The recently released list includes sites in the mid-Atlantic region, such as the American Cyanamid Co. Site in Bound Brook, NJ; the Diamond Alkali Site in Newark, NJ; and the Ventron/Velsicol Site in Wood Ridge, NJ.

In terms of new EPA personnel, only the Regional Administrator position for EPA Region 9 remains open. The rest of the positions have been filled, including Alexandra Dapolito Dunn appointed as Region 1 Administrator, Peter Lopez as Region 2 Administrator, Cosmo Servidio as Region 3 Administrator, Trey Glenn in Region 4, Cathy Stepp named for Region 5, Anne Idsal for Region 6, Jim Gulliford in Region 7, Doug Benevento in Region 8, and Chris Hadlick in Region 10. Important posts have been filled at headquarters, including Bill Wehrum as the Assistant Administrator for the Office of Air and Radiation, Susan Bodine as Assistant Administrator for the Office of Enforcement and Compliance Assurance, David Ross as Assistant Administrator for the Office of Water, and Matt Leopold as EPA General Counsel.

Looking forward to 2018, we can expect EPA to pursue its proposed repeal of the Clean Power Plan, its revision of the WOTUS, and deregulatory actions on a host of other federal environmental rules that have been subject to delay or proposed repeal. EPA appears to be moving forward with considering a replacement to the Clean Power Plan, with the release on December 18 of an Advance Notice of Proposed Rulemaking requesting public input on a potential replacement rule. The administration's Unified Agenda of Regulatory and Deregulatory Actions signals the administration's continued focus on the reduction of regulatory burdens and costs and sets a "better than 2:1" goal for 2018, with plans to finalize three deregulatory actions for every new one in FY 2018. With the fate of several federal rules still uncertain, environmental groups and states will continue to take an active role in providing feedback to the agency, and in evaluating impacts to delegated and parallel state programs. Of particular note for manufacturing facilities, EPA has recently announced its intention to evaluate reforms to the Clean Air Act New Source Review pre-construction permitting program. We can also expect EPA's focus on the Superfund program to continue with Administrator Pruitt's direct participation and oversight of priority sites.

A detailed analysis of The Trump Administration and EPA by McCabe and Colón originally appeared in *The Legal Intelligencer* article on January 11, 2018.

The Superfund Task Force Recommendations

John F. Gullace, Esq. and Kathleen B. Campbell, Esq.

Rarely do large bureaucracies move quickly, but EPA Administrator Pruitt's efforts to reshape the federal Superfund program have moved at an unusually brisk pace by any standards. On May 9, 2017, Administrator Pruitt issued a memorandum that gave him and his designee sole authority to select

Superfund remedies that are likely to exceed $50 million. Later that month, on May 22, Administrator Pruitt issued another Memorandum, this one titled: "Prioritizing the Superfund Program," in which he formed a Superfund Task Force to "provide recommendations on an expedited timeframe on how the agency can restructure the cleanup process, realign incentives of all involved parties to promote expeditious remediation, reduce the burden on cooperating parties, incentivize parties to remediate sites, encourage private investment in cleanups and sites, and promote the revitalization of properties across the country."

The Superfund Task Force, which was comprised of EPA personnel from across the country, completed its work on June 21, 2017, and its recommendations were made public on July 25, 2017. The Superfund Task Force developed 42 recommendations, none of which require legislation. The themes we gleaned from the recommendations are that EPA wants to show quick progress at high-profile sites and generally speed up the Superfund process; EPA intends to reduce the number of Superfund sites on the National Priorities List (NPL) by completing cleanups and being more selective about the sites added to the NPL; and EPA will focus on ways to bring contaminated sites back into productive use. We can expect EPA to use both the carrot and the stick in pursuit of these goals in 2018.

One specific recommendation was that the Administrator become directly involved in ten high priority sites, a so-called Top 10 List. On December 8, 2017, EPA announced that the Top 10 List had been created – and initially consists of 21 sites that will receive Administrator Pruitt's direct attention. The Administration has staked much of its environmental agenda on its ability to make the Superfund program more efficient, so we expect the Administration to continue its drive to accelerate the cleanup of high profile Superfund sites, such as those on the Top 21 List. Responsible parties at these sites, and other sites, should expect to see the Superfund process move more quickly than historically has been the norm. Equally, responsible parties may encounter an EPA that is more flexible when it comes to remedies, employing strategies such as adaptive management, but also perhaps quicker to issue orders where progress does not meet EPA's expectations.

On January 17, 2018, EPA released a "Superfund Redevelopment Focus List" identifying 30 Superfund Sites "with the greatest expected redevelopment and commercial potential." EPA developed the list in response to the Superfund Task Force Recommendations and is seeking to accelerate the productive reuse of these sites. According to EPA, it "will focus redevelopment training, tools and resources towards the sites on this list." The list of 30 focus sites includes three in Pennsylvania and one in New Jersey: the BoRit Asbestos site in Ambler, PA; the Crater Resources site in Upper Merion Township, PA; the Metal Bank site in Philadelphia, PA; and the Roebling Steel Co. site in Florence, NJ. EPA Administrator Pruitt was quoted in EPA's announcement as saying: "EPA is more than a collaborative partner to remediate the nation's most contaminated sites, we're also working to successfully integrate Superfund sites back into communities across the country, … Today's redevelopment list incorporates Superfund sites ready to become catalysts for economic growth and revitalization."

The pace at which Pruitt's EPA continues to address the Task Force recommendations is obviously unknown at this point, but as of now all signs point to speed. We expect Superfund to remain an EPA priority in 2018 and will watch with interest to see what specific new tools might be employed by EPA to begin returning contaminated sites to productive use.

EPA Begins Repeal and Replacement of Clean Water Rule in Effort to Limit Federal Wetland Permitting Jurisdiction

James M. McClammer, Esq.

The Clean Water Rule, as it is known, was promulgated in 2015 to redefine "waters of the United States," a term used to prescribe the limits of federal wetlands permitting jurisdiction on private property by the U.S. Corps of Engineers pursuant to the Clean Water Act (CWA). The controversial rule is the response of the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) to several U.S. Supreme Court decisions that questioned the Corps' expansive view of its permitting jurisdiction pursuant to Section 404 of the CWA.

Once promulgated, the Clean Water Rule was challenged by a number of states, private parties, and environmental organizations in various federal courts, alleging, in part, that the rule exceeded the authority of the CWA. The Sixth Circuit stayed the Clean Water Rule nationwide, and the U.S. Supreme Court heard argument this past October on whether the jurisdiction over challenges to the rule should sit with the federal appellate or district courts. At this time, because of the Sixth Circuit's stay, the pre-2015 rule defining "waters of the United States" remains in effect.

The stay of the 2015 Clean Water Rule has allowed the Trump administration to focus on repealing the rule and replacing it with one that would curb the Corps' jurisdiction over waterbodies such as wetlands. This past July, EPA and the Corps initiated a two-step rulemaking process to (1) reinstitute the prior-2015 rule which is currently in place due to the Sixth Circuit's stay of the Clean Water Rule; and (2) propose a new definition of "waters of the United States" consistent with the principles of limited jurisdiction outlined by the late Justice Scalia in *Rapanos v. United States*, one of the U.S. Supreme Court cases leading to the promulgation of the 2015 Clean Water Rule. While the agencies work on replacing the Clean Water Rule, they also published a proposed rulemaking to extend the applicability date for the 2015 Clean Water Rule until two years from the date on which that rulemaking becomes final.

Thus, the legal challenges to the Clean Water Rule currently working their way through the court system may prove moot if the Trump administration succeeds in entirely replacing the Clean Water Rule, thereby limiting the Corp's Section 404 permitting authority pursuant to the CWA.

Application of New TSCA Rules Will Continue to Evolve in 2018

Todd D. Kantorczyk, Esq.

In the waning days of the Obama Administration, the United States Environmental Protection Agency (EPA) published three draft Toxic Substances Control Act (TSCA) rules that were required by the Frank R. Lautenberg Chemical Safety for the 21st Century Act (the "Act") to be finalized by June 22, 2017. EPA did, in fact, publish final versions of these three rules—the Risk Evaluation Rule, the Prioritization Rule, and the Inventory Reset Rule—in late July and early August of 2017, but the final versions differed in certain key respects from the draft rules. In general, the final versions of the Risk Evaluation Rule and the Prioritization Rule gave EPA additional flexibility regarding the "conditions of use" that EPA must consider in determining whether a new or existing chemical poses an unreasonable risk to human health or the environment. With respect to the Inventory Reset Rule, the final rule modified how companies can assert that the identity of a chemical qualifies as confidential business information.

Environmental groups that had previously lauded the draft rules now asserted that the final rules failed to satisfy the requirements of the Act and ultimately filed seven challenges to the final rules in three different federal circuits (D.C., 4th and 9th). Those appeals are still in the briefing stage, and at the end of November 2017, the Ninth Circuit denied EPA's motion to move the challenge pending before that court to the Fourth Circuit.

The courts hearing the foregoing challenges have not stayed any of the new rules, however, and EPA has continued to move forward with plans to implement them. For example, EPA continues to expect that manufacturers and importers of chemical substances will identify by February 7, 2018, whether substances listed on the current TSCA Inventory are active in U.S. commerce, with processors required to supplement that list by October 5, 2018. And at the end of 2017, EPA released two documents and held two public meetings concerning the Agency's future approaches towards the review of new chemicals and the identification of existing chemicals for priority risk reviews. EPA is taking public comment on the new chemicals framework document and the prioritization document until January 20 and January 25, 2018, respectively. It is also working on a TSCA mercury reporting rule which is addressed here. In short, 2018 promises to be another significant year with respect to implementation of the fundamental amendments to the TSCA regulatory framework as required by the sweeping reforms contained in the Act.

TSCA Mercury Reporting Final Rule Expected by Summer 2018

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As part of EPA's continuing efforts to implement the Frank R. Lautenberg Chemical Safety for the 21st Century Act, which amended the Toxic Substance Control Act (TSCA) enacted on June 22, 2016, the EPA has issued a proposed mercury reporting rule to implement TSCA section 8(b)(10)(D). The TSCA Amendments require EPA to issue a final mercury reporting rule no later than two years after the enactment of the TSCA amendments (by June 22, 2018) to establish reporting deadline(s) and information requirements for the purpose of assisting EPA's statutorily-mandated periodic update and publication of the inventory of mercury supply, use, and trade in the United States. As required under TSCA, the reporting requirements would apply to any person who manufactures mercury or mercury-added products or otherwise intentionally uses mercury in a manufacturing process.

EPA published the proposed rule on October 26, 2017 requiring those who manufacture, import, or otherwise distribute in commerce mercury or mercury-added products to report to EPA both quantitative and qualitative data related to those activities. The proposed rule has no reporting threshold, and as such, anyone conducting the regulated activity with any amount of mercury falls within the framework of the proposed rule. Persons engaging in certain activities with mercury will be required to provide the information necessary for the inventory.

Generally, the proposed rule applies to those who manufacture, store, import, export, sell, or otherwise distribute in commerce mercury and mercury-added products. Those engaged in the above-mentioned activities must report on quantities of mercury used in industrial processes, whether that mercury was manufactured, imported, exported, or distributed. Some reduced burden for reporting is envisioned in the proposed rule for manufacturers or importers already subject to reporting programs such as TSCA's Chemical Data Reporting (CDR) Rule. For example, those who manufacture (including import) or otherwise engage in the regulated activities with mercury at levels greater than or equal to 2,500-pounds for elemental mercury and 25,000-pounds for mercury compounds in a specific reporting period; the

country of origin or destination, the North American Industrial Classification System (NAICS) codes for mercury distributed in commerce, and amount of mercury stored must be included in reports. The proposed rule establishes a reporting deadline of July 1, 2019, coinciding with the Toxic Release Inventory (TRI) program deadline, and every three years thereafter. As it stands, the proposed rule would require reporting data of the proceeding calendar year only (i.e., 2018).

The proposed rule exempts certain activities from the rule's reporting obligations. Persons "engaged in the generation, handling, or management of mercury-containing waste" are not required to report to the mercury inventory. The notice specifically calls out hazardous waste treatment facilities that convert recovered mercury from mercury-containing waste to mercury sulfide for export as exempt from reporting to the proposed rule. At the same time, the exemption does not apply to persons who distill and recover elemental mercury for its eventual sale.

EPA estimates that approximately 750 entities will be impacted by the reporting requirements.

Hazardous Waste E-Manifest System to Go Live in 2018

Rodd W. Bender, Esq. and Michael C. Nines, P.E., LEED AP

Several years in the making, the U.S. Environmental Protection Agency (EPA) electronic hazardous waste manifest (e-Manifest) system is scheduled to launch on June 30, 2018. This modernized system will facilitate electronic submission of hazardous waste manifests through a uniform national program covering all federal and state wastes requiring manifests. Once implemented, the system should reduce costs and effort required to prepare and handle paper manifests by hazardous waste generators, transporters, and treatment, storage, and disposal (TSD) facilities; produce more accurate and timely waste shipment information; allow for quicker notification of manifest discrepancies; and establish a single on-line repository of manifest data for EPA, states, regulated entities, and the public. EPA estimates that three to five million paper manifests are produced annually.

Roll-out of the system will culminate a decade-long process that accelerated in 2012 with enactment of the Hazardous Waste Electronic Manifest Establishment Act (e-Manifest Act) authorizing EPA to work with industry and states to implement a national electronic manifest system. EPA published a final rule in 2014 that, among other things, recognizes e-Manifests as the legal equivalents of paper manifests, allows electronic signatures, and authorizes transporters and TSD facilities to accept e-Manifests in lieu of paper forms. Use of e-Manifests will be optional (other than for receiving facilities) but strongly encouraged by EPA.

The e-Manifest Act also authorized EPA to collect reasonable user fees to develop and maintain the system. On January 3, 2018, EPA published a final rule establishing the user fee methodology. The fees are intended to cover costs to develop, operate, maintain, and upgrade a national e-Manifest system, provide public access to the data, and collect and process data from any paper manifests submitted after the e-Manifest system begins to operate. A copy of the user fee final rule can be found here. Anticipated fees will primarily be the responsibility of receiving facilities and are tentatively set to range between $4 and $20 per manifest submittal. EPA will have the authority to seek sanctions for non-payment of user fees. The final rule also addresses some non-fee issues, including for example establishing a process for correcting erroneous data and restricting public access to certain manifest data for chemical security purposes.

EPA has been conducting outreach on the e-Manifest system through a website, webinars, stakeholder meetings, and other methods. The agency has also been helping states prepare for launch, including aligning state manifest practices with the new system, adopting the federal rules, and engaging regulated entities. In the coming months hazardous waste generators, transporters, and TSD facilities should look for more information and training opportunities from EPA and state agencies to be prepared when e-Manifests go live this summer.

Trump Administration Expected to Propose Revisions to Wildlife Regulations

Michael Dillon, Esq.

In 2018, the Trump Administration is expected to publish proposed amendments to regulations administered by the United States Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS). The Executive Branch's Fall 2017 Regulatory Plan previews possible changes to the Endangered Species Act (ESA) and the Migratory Bird Treaty Act (MBTA). The statutes and their regulations bestow protections on threatened and endangered species and certain migratory birds. Such protections often include prohibitions on or modifications to development projects that might harm one or more listed species.

On the topic of possible deregulatory actions under the ESA, the Fall 2017 Regulatory Plan states that FWS and NMFS will publish rule revisions that will be aimed at improving "how the ESA is administered and [reducing] unneeded burdens." The agencies will also look for "opportunities to create efficiencies and streamline the consultation process and the listing and delisting process." Similarly, the Regulatory Plan states that FWS will aim to become "more efficient and timely" in administering the MBTA. To that effect, FWS will consider making regulatory changes to the MBTA rules that will "reduce the burden on industry." FWS is also contemplating other regulatory changes that will "allow applicants to proceed more quickly through the bald and golden eagle permit process."

Although little detail has emerged about the potential rule revisions, the forthcoming proposals likely will reflect the Trump Administration's "fundamental shift" towards regulatory policy, as reflected in the Regulatory Plan. The Administration states that executive actions should be informed by the idea that "excessive and unnecessary federal regulations limit . . . innovation and entrepreneurship," and that limited government intervention is preferable. Furthermore, the 2018 regulatory agenda set forth in the plan is intended to "send a clear message that the public can invest and plan for the future without the looming threat of burdensome and unnecessary new regulations." Considering these policy statements, it seems likely that the amendments to the wildlife rules will be a boon for industry and development.

PENNSYLVANIA FORECAST

Applying the Environmental Rights Amendment in 2018

Thomas M. Duncan, Esq.

On June 20, 2017, the Pennsylvania Supreme Court, in *Pa. Environmental Defense Foundation v. Commonwealth*, No. 10 MAP 2015 (Pa. June 20, 2017) (*PEDF*), established a heightened standard of review for challenges brought under Pennsylvania's Environmental Rights Amendment. The Environmental Rights Amendment (ERA), embodied in Article I, Section 27 of the Pennsylvania Constitution, states:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

The Court in *PEDF* found that the first sentence of the ERA provides an individual right "to clean air and pure water, and to the preservation of natural, scenic, historic and esthetic values of the environment." The second and third sentences, the Court found, impose obligations on the Commonwealth, as trustee, to protect the Commonwealth's public natural resources on behalf of the people. These trustee obligations, the Court stated, apply to municipalities as well. The Court in *PEDF* applied the trustee provisions of the ERA to overturn several statutory enactments that directed revenue from the leasing of state forest and park lands for oil and gas exploration and extraction to the general fund instead of a fund to be used exclusively for environmental protection.

On August 15, 2017, the Pennsylvania Environmental Hearing Board, in *Center for Coalfield Justice v. DEP*, EHB Docket No. 2014-072-B (Adjudication issued Aug. 15, 2017), addressed the ERA in the environmental permitting context in light of the new standards established by the Pennsylvania Supreme Court in *PEDF*. The Board held that the test to determine whether the individual right of the ERA was violated is to determine whether the Pennsylvania Department of Environmental Protection (PADEP) considered the environmental effects of its permitting action and whether that action is likely to cause, or in fact did cause, the unreasonable degradation or deterioration of the natural, scenic, historic, and esthetic values of the environment. The Board found that the test to determine whether the trustee obligations under the ERA were fulfilled is whether PADEP properly carried out its trustee duties of prudence, loyalty, and impartiality to conserve and maintain the public natural resources at issue by prohibiting their degradation, diminution, and depletion. While the Board has continued to announce that the ERA Constitutional standard is not coextensive with PADEP's regulations, the practical result thus far has been that regulatory compliance results in ERA compliance and regulatory noncompliance results in ERA noncompliance.

In light of the Pennsylvania Supreme Court's holding in *PEDF*, courts in 2018 will be faced with a number of difficult issues involving the ERA, including (1) the scope of the term "public natural resources," (2) the extent to which the ERA applies to private action, and (3) the obligations that the ERA imposes on municipalities and state agencies other than PADEP.

Update on Management of Fill Policy

Michael M. Meloy, Esq.

In terms of ramifications for the regulated community, few if any technical guidance documents issued by the Pennsylvania Department of Environmental Protection (PADEP) rival in importance the Management of Fill Policy (also referred to as the Clean Fill Policy). The Management of Fill Policy establishes guidelines for delineating between fill material that can be used as unregulated "clean fill" and fill material that instead must be managed as a waste under the Pennsylvania Solid Waste Management Act (SWMA), 35 P.S. §§ 6018.101 – 6018.1003. The current version of the Management of Fill Policy was issued in 2004 and was slightly revised in 2010.

On December 20, 2014, PADEP issued proposed changes to the Management of Fill Policy for public comment. The proposed changes focused predominantly on modifying the numeric standards that are used to help determine whether fill material qualifies as "clean fill" or instead is regulated under the SWMA. The proposed changes also included modifications to the sampling and analytical protocols contained in the Management of Fill Policy. The proposed changes sparked significant public comments during the public comment period that closed on February 18, 2015.

In response to the public comments it received, PADEP has been reconsidering how to proceed with the proposed changes to the Management of Fill Policy. It appears that instead of making limited revisions to the Management of Fill Policy as proposed, PADEP instead will embark on efforts to overhaul in a more fundamental manner the Management of Fill Policy. The updated version of the Management of Fill Policy is expected to be released in proposed form later this year for public comment.

Based on discussions with PADEP, we anticipate that the numeric standards used to help define whether fill material is contaminated or instead qualifies as "clean fill" will be changed. The numeric standards in the current version of the Management of Fill Policy are generally based on the direct contact numeric values and generic soil-to-groundwater numeric values developed by PADEP to implement the statewide health cleanup standard under the Pennsylvania Land Recycling and Environmental Remediation Standards Act (Act 2), 35 P.S. §§ 6026.101 – 6026.908, for soils at residential properties overlying used aquifers. Since these standards were adopted in 2004, the numeric values under Act 2 have been amended on multiple occasions. The most recent amendments took effect on August 27, 2016. PADEP plans to use the most recent cleanup standards under Act 2 as a point of departure in developing new "clean fill" numeric standards. It also appears likely that PADEP will incorporate future changes to the cleanup standards under Act 2 by reference in the revised version of the Management of Fill Policy, meaning that the "clean fill" numeric standards will change approximately every three years and will likely be below background levels for commonly occurring regulated substances including benzo(a)pyrene and vanadium. Whether PADEP fully embraces the "tool box" available under Act 2 for setting residential cleanup standards for soils as it establishes new numeric standards for "clean fill" remains an open question.

If PADEP revises the numeric standards under the Management of Fill Policy as expected, PADEP will need to tackle the difficult issue of how to address background levels of regulated substances that might be higher than the new "clean fill" standards. Significant problems will be created if PADEP fails to include a necessary a "safety valve" for such situations. In addition, we anticipate that the revised Management of Fill Policy will address on some level how new numeric standards for "clean fill" will be phased in with respect to ongoing or completed projects. For example, where new numeric standards are more restrictive than current standards, such changes will necessarily place into question the status of fill material that was used in accordance with the current numeric standards but which might not qualify as "clean fill" under the new numeric standards. Likewise, the status of fill material that has been acquired in reliance on the current clean fill standards but may not be used by the time the new standards take effect will need to be resolved.

Given the importance of the Management of Fill Policy, it will be critical for the regulated community to carefully review the changes to the Management of Fill Policy that are expected to be proposed and to take advantage of the additional public comment period that PADEP is envisioning to solicit input regarding those changes.

Changes to Pennsylvania's Act 2 Program – New Cleanup Standards for Aldrin, Beryllium and Cadmium

William E. Hitchcock, Technical Consultant

On December 12, 2017, Pennsylvania's Environmental Quality Board (EQB) unanimously approved a final-omitted rulemaking to substantially increase the Act 2 cleanup standards for beryllium, cadmium, and aldrin. The Act 2 cleanup standards are risk-based, meaning they are calculated according to the methods described in 25 Pa. Code Chapter 250 using the best-available toxicological data to be protective of human health under a variety of exposure scenarios. The standards must be periodically revised as newer and more accurate toxicological information becomes available, and the last such revision occurred in August 2016.

This currently proposed revision is intended to correct errors that were discovered in the 2016 cleanup standards for three substances: aldrin, beryllium, and cadmium. The original and corrected cleanup standards are presented in the table below.

Substance	Environmental Media	August 2016 Value	Corrected Value
Aldrin	Groundwater	0.43 µg/L	0.043 µg/L
Beryllium	Soil, residential	2 mg/kg	440 mg/kg
Beryllium	Soil, non-residential	11 mg/kg	6,400 mg/kg
Cadmium	Soil, residential	1.2 mg/kg	110 mg/kg
Cadmium	Soil, non-residential	6 mg/kg	1,600 mg/kg

These corrections will result in a decreased cleanup standard for the environmentally-persistent organochlorine insecticide aldrin. Since aldrin is currently a contaminant of concern at only 10 cleanup sites in Pennsylvania, this correction is expected to have limited impact on the regulated community. However, the substantial increases to the cleanup standards for the naturally-occuring metals beryllium and cadmium should have a significant positive effect on many Act 2 cleanup sites across the state, allowing for a faster and less-expensive path to obtaining Act 2 liability relief while still remaining protective of human health.

MGKF was instrumental in identifying and correcting these errors because of the participation of our partner, Michael Meloy, on the Cleanup Standards Scientific Advisory Board. Because these corrections are not expected to significantly increase the burden on the regulatory community, this proposed rulemaking is not planned to go through the typical public-commenting process. Therefore, the new cleanup standards should go into effect when they are published to the Pennsylvania Bulletin and Code in the Spring of 2018.

Update on Proposed Revisions to Pennsylvania's Storage Tank and Spill Prevention Program

William E. Hitchcock, Technical Consultant

On October 17, 2017, Pennsylvania's Environmental Quality Board (EQB) unanimously approved the adoption of proposed changes to the Storage Tank and Spill Prevention Program regulations found at 25 Pa. Code Chapter 245. Many of the proposed changes were prompted by EPA's July 15, 2015 revisions to the federal storage tank regulations at 40 CFR Part 280, which must be implemented at the state level (in

authorized states) within three years. The Pennsylvania Department of Environmental Protection (PADEP) intends to publish the revised regulations for a 30-day public comment period in February of 2018.

The proposed changes to Chapter 245 are intended to strengthen the Underground Storage Tank (UST) requirements by increasing the emphasis on properly operating and maintaining spill prevention, overfill prevention, and release detection equipment through increased inspection and testing. The new requirements that have been proposed for UST systems include:

- A visual inspection of spill prevention equipment and release detection every 30 days.
- A visual inspection of containment sumps and handheld release detection devices annually.
- Testing of spill prevention equipment every three years.
- Inspection of overfill prevention equipment every three years.
- Testing of containment sumps used for interstitial monitoring every three years.
- Annual testing of release detection equipment.
- Mandatory release detection for emergency generator USTs. Previously, emergency generator USTs were deferred from having to meet release detection requirements.
- Prohibit flow restrictors (ball float valves) as an option for overfill prevention in new UST systems.

Significantly, the proposed regulations also add additional clarifying language to the regulatory definition of the word "release". The additional language specifies that releases of regulated substances to containment structures are considered to pose an immediate threat of contamination of environmental media, and therefore are required to be reported except under specific circumstances. This proposed change, if adopted, is likely to result in substantially increased reporting of releases from the estimated 12,600 storage tank facilities in Pennsylvania.

PADEP to Forge Ahead with Proposed Air Fee Increases in 2018

Katherine L. Vaccaro, Esq.

In the fall of 2017, the Pennsylvania Department of Environmental Protection (PADEP) announced its plans to (1) increase existing fees for permit applications and annual emissions fees for Title V facilities; and (2) establish new fees for the review of certain information by the Air Quality Program for which no fees are currently required. According to PADEP, the reason for the fee increases is to generate more revenue for the Commonwealth's Clean Air Fund, which is expected to have a negative balance in less than five years absent some uptick in revenue. In fact, one of the primary reasons cited by PADEP for the Clean Air Fund's dwindling balance is the fact that there has been a significant trend in emissions reductions, and therefore a corresponding reduction in emissions fees due, over the past 15 years. But nevertheless, if finalized, these changes would affect thousands of facilities in Pennsylvania.

Under PADEP's current proposal, the fee increases would extend to plan approval and operating permit applications, among other types of applications. PADEP would also establish *new* fees for (1) Requests for Determination (RFD) of changes of minor significance and exception from plan approval, and (2) notifications of asbestos abatement and demolition/renovation, both of which PADEP currently processes at no charge. With respect to annual emissions fees, PADEP is still considering several options, but the Department's preferred approach would increase the cost per ton of pollutant emitted from approximately $90 to $110 (up to a maximum of 4,000 tons per pollutant per year, as PADEP is not planning on adjusting

or eliminating the current cap). The increased fees would take effect for emissions generated during calendar year 2018, with payments due by September 1, 2020.

This issue continues to garner significant interest at the state level, with PADEP's Air Quality Technical Advisory Committee (AQTAC) raising several concerns about the fee increases during its December 2017 meeting. In particular, the AQTAC members devoted meaningful discussion time to the fact that PADEP's current proposal would not impose an emission fee for carbon dioxide, notwithstanding its classification as a regulated pollutant. PADEP currently expects to deliver a draft proposed rulemaking package to AQTAC during the second quarter of 2018. Following review by ACTAC and, then, the Environmental Quality Board, the proposed rule will be published for public comment. Interested parties should therefore stay tuned as these issues continue to unfold, including identifying opportunities for public participation in the ongoing regulatory development process.

DRBC Proposes Rule to Ban Hydraulic Fracturing and Restrict Wastewater Operations

Todd D. Kantorczyk, Esq.

At the beginning of December 2017, the Delaware River Basin Commission (DRBC) issued a Notice of Proposed Rulemaking and Public Hearing that if adopted would prohibit hydraulic fracturing activities within the Delaware River basin. The rule would also strictly regulate and require DRBC approval for both the withdrawal of water from within the basin for hydraulic fracturing activities outside the basin and the treatment of oil and gas wastewaters within the basin.

Hydraulic fracturing activities have been effectively prohibited in the basin since May of 2010, when the Commissioners voted to postpone any decisions on dockets related to hydraulic fracturing until the DRBC adopted corresponding regulations. The DRBC released a draft of regulations at the end of 2010, revised them in 2011, but eventually cancelled the meeting scheduled to vote on the rules. The DRBC had not revisited this issue until Fall 2017, when the Commissioners passed a resolution directing the DRBC staff to draft a rule prohibiting hydraulic fracturing activities within the region.

Citing reports authored by the New York State Department of Environmental Conservation and the United States Environmental Protection Agency in 2016, the DRBC notice states that the use of hydraulic fracturing to extract natural gas from the Marcellus and Utica formations presents risks, vulnerabilities and impacts to the quality and quantity of surface and groundwater resources in the basin at each step of the "hydraulic fracturing water cycle." Based on these risks, the DRBC not only prohibited hydraulic fracturing activities within the basin, but also required DRBC approval for the export of any water from the basin for use in hydraulic fracturing outside the basin, even if the withdrawal volume falls below the 100,000-gallon daily average that the DRBC has deemed to have no substantial effect under other circumstances. Furthermore, wastewater from oil and gas operations, called "produced water," may not be treated within the basin unless the water meets certain standards applicable to produced water and the treatment receives prior approval from the DRBC.

Public hearings on the proposed rule are scheduled for January 23 in Waymart, Pennsylvania, January 25 in Philadelphia, Pennsylvania, and February 22 in Schnecksville, Pennsylvania. The DRBC is also hosting a public hearing via phone on March 6. All public comments are due by March 30, 2018. Both industry representatives and landowner groups with pending lawsuits designed to force the DRBC to allow natural

gas development have objected to the proposed rule as inconsistent with decades of experience with and studies concerning hydraulic fracturing. At the same time, environmental groups opposed to natural gas activities have expressed concern that the proposed rule raises the possibility of produced water treatment within the basin. As a result, even publication of a final rule after eight years of a *de facto* moratorium will probably not be the last word in 2018 on the future of natural gas activity in the basin.

Philadelphia Water Department Rate Case on the Horizon

Michael C. Nines, P.E., LEED AP, Technical Consultant

During the first quarter of 2018, the Philadelphia Water Department (PWD) is expected to file Advance Notice of rate increases with the Philadelphia Water, Sewer and Stormwater Rate Board (Rate Board) and City Council. The Advance Notice is anticipated to cover rate increases for Fiscal Years 2019 through FY2022 (July 1, 2018 to June 30, 2022). The new rate increases are anticipated to be proposed for water usage, sewer and industrial surcharges, and stormwater management service charges. The PWD is anticipating that the new rate increase will be approved by the Rate Board during the Fall of 2018, following a series of public and technical hearings.

NEW JERSEY FORECAST

What's New in NJDEP?

Bruce S. Katcher, Esq.

Along with the election of a new governor in New Jersey, we will also have a new Commissioner heading up the New Jersey Department of Environmental Protection (NJDEP) – Catherine McCabe – a former U.S. Environmental Protection Agency official. Ms. McCabe, the Commissioner-designee until her nomination is approved by the New Jersey Senate, is an attorney with a distinguished career in government service. She began that service as an assistant attorney general in the New York Attorney General's office, followed by a 22-year stint at the U.S. Department of Justice, focusing on environmental litigation and enforcement, where she rose to the position of Deputy Chief of the Environmental Enforcement Section in 2001.

She moved to EPA in 2005 where she became the Deputy Assistant Administrator of the Office of Enforcement and Compliance and Assurance, followed by a four-year stint as a judge on EPA's Environmental Appeals Board. Her next stop was Deputy Regional Administrator of EPA Region 2 and she was selected by President Obama to serve as Acting EPA Administrator at EPA headquarters at the end of his administration and continued in that role until Scott Pruitt was confirmed to head EPA in February 2017. She returned to Region 2 as the Acting Regional Administrator until she was selected to head NJDEP by then-Governor-elect Murphy in December.

In announcing her nomination, the Governor emphasized that he "wanted someone who . . . is tough on polluters, who is understanding of those living in environmentally sensitive areas, who recognizes that our twin goals of a resilient and responsible future, and a strong and fair economy, are not mutually exclusive." Murphy also indicated that he expects McCabe to lead New Jersey to a nationally and globally prominent role on environmental issues. She certainly has a record of experience that would suggest that she is up to the job set out for her by the Governor. Whether the regulated community will be as welcoming remains to be seen.

What is the Environmental and Energy Agenda for the Murphy Administration in New Jersey?

Bruce S. Katcher, Esq.

In late November 2017, we published a Special Alert with our predictions on what may be the environmental and energy initiatives under the new Murphy administration. In brief, the following initiatives are likely to be at or near the top of the agenda:

1. Greenhouse Gas
    a. Re-entry into the Regional Greenhouse Gas Initiative and (RGGI)
    b. Possible expansion of RGGI objectives into transportation
    c. Support of the U.S. Climate Alliance and the Paris Accords
2. Electric Vehicle Use and Infrastructure
    a. Promotion of electric vehicles and infrastructure
    b. Pursuit of California zero-emission vehicle program
3. Renewable Energy and Storage
    a. Wind – vigorous effort to promote off-shore wind
    b. Solar – promote increased investment in solar to once again position New Jersey as a solar leader among the states
    c. Portfolio Standards – support a move to 100 percent clean energy by 2050
    d. Storage – promote clean energy storage
    e. Siting – promote renewable siting to minimize adverse environmental impacts
4. Nuclear – Murphy indicated support for nuclear as an energy source during the campaign, however many of the environmental groups supporting him are not on board.
5. Fracking – support for initiatives that would disincentive fracking
6. Resiliency – Continue to support resiliency efforts including smart girds, microgrids and advanced metering as well as protection of the shore from damaging storms.
7. Urban toxics, diesel emissions, environmental justice and ports – The Governor-elect's campaign materials emphasize the importance of addressing disproportionate environmental impacts on low income and politically vulnerable communities. Thus, these areas are expected to be a focus of these efforts.
8. Land Use Regulation
    a. Smart Growth – An important plank of the Murphy platform was to return New Jersey to a leadership role in smart planning.
    b. Status of recent regulatory changes – Land use regulatory revisions adapted over the last several years could be a target for re-evaluation.
    c. Highlands and Pinelands – The composition of both Commissions could face change and some key recent decisions (e.g., re pipelines in the pinelands and septic density in the Highlands) could face re-examination.
9. Site Remediation – this topic is addressed under a separate article in this Forecast here.
10. Strategic state leadership on environmental issues where EPA retreats – Expect New Jersey to take a leading role on issues such as climate change where EPA is retrenching.

Changes in Store for Site Remediation Program and SRRA?

Bruce S. Katcher, Esq.

While it is unclear whether the new administration will make significant changes in the site remediation regulatory program, it seems likely that an effort to amend the Site Remediation Reform Act (SRRA) will at least begin in 2018. Now that over eight years have passed since the statute was enacted in 2009, it is obvious that the statute is in need of fine tuning. Examples of issues that could be addressed in that process include the following:

1. Remedial Action Permits: Improvements to the remedial action permit process to
    a. Clarify that the process should not be used by NJDEP as a substitute for remedy review but instead only to review the post-remedy monitoring and maintenance program,
    b. Eliminate the requirement that an owner that acquired a property after a discharge occurs and implements a remediation must remain a permittee indefinitely and have permittee status eliminated after it sells the property, and
    c. Authorize the issuance of permits by rule and general permits based on LSRP certification that would eliminate the extensive delays in NJDEP permit issuance that are created under the current system of individual permits.
2. Financial Assurance: Reform the options for financial assurance for engineering controls to allow self-guarantees and surety bonds (including with respect to remediation funding sources under the Industrial Site Recovery Act as to the latter) and reduce the term of financial assurance mechanisms, with allowance for renewal as appropriate.
3. Direct Oversight: Creation of a process to terminate direct oversight for cases where parties proceed in good faith to correct a deficiency that caused them to be in direct oversight and to expand the litigation settlement carve out to include matters settled administratively by consent order.
4. Liability Reform: Provide more clarity as to and expand liability relief for innocent purchasers (e.g., see the bona fide prospective purchaser relief available under federal Superfund law) and volunteers.
5. Historic pesticides/historic fill: The status of these conditions and when they require remediation is in need of clarification and greater flexibility than what is provided under existing law.

On the regulatory/guidance side, issues that may be in line for attention include the following:

1. Reform of the agency's fill guidance to enable the use of alternate fill above the floodplain and relax the "like-on-like" limitation in appropriate circumstances
2. Clarification of situations in which LSRP's must evaluate so-called "contaminants of emerging concern" and what standards to apply in addressing the remediation of such contaminants (see the article elsewhere in tis Forecast for further information on the issue of emerging contaminants).
3. Application of the agency's direct oversight enforcement policy as more and more sites run afoul of missing deadlines and falling into "mandatory" direct oversight
4. Finalization of the agency's rule proposal to specify the remediation requirements for discharges from "unregulated heating oil tanks".
5. Re-examination of recent changes to soil and groundwater remediation standards and updating of default values for soil impact to groundwater standards.

Contaminants of Emerging Concern Such as PFAS to Receive Increased Attention in New Jersey

John F. Gullace, Esq.

The New Jersey Department of Environmental Protection (NJDEP) Site Remediation and Waste Management Program recently launched a webpage dedicated to "Contaminants of Emerging Concern." According to NJDEP, the new webpage "focuses on Per- and Polyfluoroalkyl Substances (PFAS)" such as perfluorooctanoic acid (PFOA); Perfluorononanoic Acid (PFNA); and Perfluorooctanesulfonic Acid (PFOS). NJDEP later announced at a technical conference that hundreds of PFAS are present in the environment; are detrimental to human health and the environment in very low concentrations; and are actively being studied by NJDEP. The import of these comments from NJDEP is that the State is developing standards for many other PFAS.

According to NJDEP, contaminants of emerging concern such as PFAS, "if discharged to the waters or onto lands of the State, are pollutants that must be remediated using a Licensed Site Remediation Professional (LSRP). When the remedial objective for a site is an entire site final remediation document and the site is currently or was formerly occupied by facilities that stored, handled, and used contaminants of emerging concern, LSRPs must consider these contaminants of concern during the investigation and remedial action. LSRPs must evaluate the site for potential spills and releases through air, water, and waste discharges." We expect the administration of Governor Murphy and Commissioner McCabe to support and expand these efforts to establish cleanup standards for PFAS, often in the parts per trillion.

The regulated community may challenge these efforts by NJDEP to establish cleanup standards for PFAS. On December 19, 2017, the Superior Court of New Jersey, Appellate Division, issued an unpublished opinion in *Chemistry Council of New Jersey v. NJDEP*, No. A-1439-15T4, that invalidated the Interim Specific Ground Water Quality Criteria (ISGWQC) for PFNA adopted by NJDEP. According to the court: "The record here shows that these interim criteria have become de facto a permanent regulatory scheme without the agency complying with the requirements of the [Administrative Procedures Act] APA. As such, these measures are declared invalid." Opinion at 15. Although the court's opinion may be moot as to PFNA in light of rulemaking initiated by NJDEP in 2017 and finalized on January 16, 2018, which set a final standard for PFNA, the message from the court is clear. Any effort by NJDEP to regulate other PFAS must more promptly trigger the formal rulemaking process under the APA, with its attendant opportunity for comment and, potentially, litigation. In 2018, we expect to see new cleanup standards for previously obscure PFAS, new rules, and potentially litigation as NJDEP and the regulated community grapple with how to address these contaminants of emerging concern.

NJDEP's Direct Oversight of Contaminated Properties Undergoing Remediation Will Continue to Evolve in 2018

John F. Gullace, Esq.

Properties that are in the New Jersey Department of Environmental Protection (NJDEP) Site Remediation Program (SRP) are required to complete various cleanup activities by specified deadlines under the auspices of a Licensed Site Remediation Professional (LSRP). If the remediation of a site fails to stay on schedule, the site may become subject to the onerous Direct Oversight (DO) requirements of the Administrative Requirements for the Remediation of Contaminated Sites (ARRCS). N.J.A.C. 7:26C-14. In 2017, we saw a significant increase in the number of sites subjected to DO, either at the discretion of NJDEP or by operation of law. Regardless of the mechanism by which DO was imposed on sites, NJDEP

has also developed mechanisms to avoid or relax the DO requirements, where NJDEP believes it is warranted. Two forms of Administrative Consent Order were developed by NJDEP as a result.

Where a site faces deadlines that will not be met and a prospective purchaser wishes to acquire the contaminated property, but only if it will not be subject to DO, NJDEP has developed a Pre-Purchaser Administrative Consent Order (ACO) which must be negotiated and fully executed by the purchaser and NJDEP prior to the acquisition. This form of ACO effectively extends the deadlines that would otherwise trigger DO. Another mechanism being used in circumstances where DO has been triggered at a site, perhaps innocently, are ACOs where adjustments to the DO requirements are earned and the site is allowed to proceed through the remediation process largely under the auspices of an LSRP. The details of such orders vary depending upon the circumstances of each site.

Absent the change in administration in Trenton, we would have expected this flexible approach to DO to expand as more and more sites are deemed by NJDEP to have triggered DO; however, it's unclear whether the new administration will look favorably on this flexibility when DO has been triggered or is likely to be triggered. Equally, it's unclear whether non-governmental organizations (NGOs) might challenge any ongoing efforts by NJDEP to "relax" the strictures of DO. This will be an emerging issue to watch in 2018.

What's in the Air for 2018 in New Jersey?

Carol F. McCabe, Esq.

NJDEP has been active in 2017 on the air front, and we'll likely see some of NJDEP's initiatives carry over into 2018. On the permitting front, NJDEP has recently announced several new general permits: GP-016A, which covers minor source manufacturing and material handling equipment with potential emissions below reporting thresholds, is intended to constitute a more flexible and workable replacement for existing general permits governing abrasive blasting, woodworking and small emitters; GP-018 and general operating permit GOP-008 for boiler(s) or heater(s) with a rated capacity greater than or equal to 5 MMBtu/hr and less than 10 MMBTU/hr, are intended to replace the current general permit for boiler(s) or heater(s) each less than 10 MMBTU/hr. Additional general permit actions are anticipated to include revisions to general permits governing fuel dispensing facilities, portable equipment, boilers and heaters with a rated capacity equal to or greater than 10 MMBtu/hr and less than 50 MMBtu/hr and non-MACT plating operations.

Several rulemaking actions have been completed, including the recently published rules that adopt federal VOC control technique guidelines for paper, film and foil coatings, fiberglass boat manufacturing materials, miscellaneous metal and plastic parts coatings, and industrial cleaning solvents, as well as NOx RACT standards governing existing simple cycle combustion turbines combusting natural gas and compressing gaseous fuel at major NOx facilities and from stationary reciprocating engines combusting natural gas and compressing gaseous fuel at major NOx facilities. A rule addressing federal PM2.5 New Source Review permitting requirements and the removal of certain startup, shutdown and malfunction provisions was recently finalized, as was a rule repealing t-butyl acetate (TBAC) reporting requirements and addressing the decommissioning of Stage II vapor control systems.

NJDEP's Resiliency, Air Toxics and Exemptions (RATE) rulemaking was proposed for public comment, and was adopted in final on January 16, 2018. The RATE rulemaking is intended to: 1) incorporate resiliency measures regarding the use of emergency equipment conducting construction, repair and maintenance; 2) update toxic valuations using current scientifically based values; 3) incorporate new permit exemptions for

specified equipment and operations; 4) repeal Subchapters 30 and 31 (pertaining to outdated NOx trading programs); and 5) undertake minor cleanup of existing rules. In light of the RATE rule's proposed tightening of reporting thresholds for a large number of hazardous air pollutants, this rule has potentially significant ramifications for many facilities in New Jersey.

NJDEP has also announced new developments in the world of modeling and risk assessments. Certain changes to its risk screening worksheet have been made, including the addition of sulfuryl fluoride as a pollutant for which risk screening must be conducted and the adoption of California's risk factor for those assessments. N-Propyl Bromide is also being considered for inclusion, while the unit risk factor for ethylene oxide has changed from 8.8E-5 per µg/m³ to 3E-3per µg/m³ and the unit risk factor for trichloroethylene has changed from 2E-6 per µg/m³ to 4.8E-6 per µg/m³. Reference concentrations for several pollutants, including benzene and trichloroethylene, have also been changed. A description of all the recent changes can be found here. NJDEP has also announced impending revisions to Technical Manuals 1002 and 1003, governing the preparation of protocols and procedures for air modeling and risk assessment protocols. These revisions are being developed in conjunction with a small, invitation-only group of stakeholders and will be subject to public comment prior to finalization.

And, the new administration can be expected to move forward aggressively to reinstate and possibly develop new greenhouse gas initiatives. All this and more in 2018!