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2018 Environmental and Energy Law Forecast

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-occurring 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, overflow 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 overflow 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 overflow 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 AQTAC 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.

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