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AN ENVIRONMENTAL AND ENERGY LAW PRACTICE

2019 Environmental and Energy Law Forecast

Manko, Gold, Katcher & Fox takes a look at some of the key issues to watch in 2019 at the Federal level and at the state level in Pennsylvania and New Jersey.

FEDERAL FORECAST

The Trump Administration and EPA in 2019

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During his first year in office, President Trump signed executive orders declaring his intent to dismantle environmental rules, with the goal of easing regulatory burdens on industry, boosting economic growth, and gaining energy independence. As we predicted in our Forecast for 2018, EPA took several significant actions in furtherance of these goals last year, including, for example: formally proposing a new rule to replace the Obama-era Clean Power Plan; announcing revisions to several regulations in line with the Administration's support for reviving the coal industry (e.g. relaxing New Source Performance Standards (NSPS) rules for coal plants and requirements for coal ash disposal); and, proposing a new rule limiting the scope and application of the "Waters of the United States" (WOTUS) rule. This year, we can expect EPA's regulatory rollbacks to continue, but not without fervent challenges from environmental advocacy groups and heavy oversight from the newly-Democrat House of Representatives. Below are some significant Clean Air Act, Clean Water Act, Budgetary, Enforcement and Personnel issues that EPA will be facing this year. Superfund, hazardous waste, New Source Review, Renewable Fuel Standards and Endangered Species Act developments are addressed by separate articles in the MGKF 2019 Environmental and Energy Law Forecast.

Clean Air Act

In the summer of 2018, EPA issued its long-anticipated proposal to replace the Clean Power Plan, named the Affordable Clean Energy (ACE) rule. The proposed ACE rule is based on several key differences from its predecessor; most importantly, the rule defines the "best system of emissions reduction" for greenhouse gas emissions from existing power plants as on-site, heat-rate efficiency improvements. The ACE rule contains a list of candidate technologies that states would consider in establishing standards of performance for existing plants. The proposed ACE rule also contains provisions that would allow for a new preliminary applicability test for determining whether a physical or operational change made to a power plant may be a "major modification" triggering New Source Review; and new implementing regulations for emissions guidelines under Clean Air Act section 111(d). The proposed rule is thus markedly different from the Clean Power Plan, including with respect to its quantification of the costs and benefits of the rule. EPA estimates that replacing the Clean Power Plan with the ACE rule could result in $3.4 billion in net benefits, including $400 million annually.

While EPA estimates that the proposed ACE rule would reduce CO_2 emissions in 2025 by between 13 and 30 million short tons, the Trump administration has downplayed the threat of climate change. Indeed, the President expressed his disagreement with the conclusions of the National Climate Assessment report findings released in November of 2018, which warned that the U.S. could face hundreds of billions of dollars in the coming decades from climate impacts. While EPA plans to finalize the ACE rule this spring, the Agency has received extensive public comment on the proposal, including by states and environmental groups that will likely challenge the rule.

In late 2018, EPA issued a proposed rule that would ease the NSPS for greenhouse gas emissions from new, modified, and reconstructed coal-fired power plants by undoing its prior determination that carbon capture and storage (CCS) constitutes the "best system of emission reduction" for new plants. Instead, due to the high cost and limited geographic availability of CCS, EPA proposed that CO_2 limits for new sources should be based on the most efficient demonstrated steam cycle in combination with the best operating practices.

Another EPA proposal issued in December of 2018 would revise the cost-benefit analysis justifying the mercury restrictions in the Obama-era Mercury and Air Toxics Standards (MATS) rule, finding that the costs to industry of complying with the rule (estimated at $7.4 million to $9.6 million annually) heavily outweighed the quantifiable benefits of the rule (estimated at $4 million to $6 million annually). Notably, EPA's revised cost-benefit analysis excluded consideration of co-benefits of the rule associated with reduction of pollutants other than mercury, such as particulate matter. Representatives of the utility sector, however, have asked for the rule to be left as is, since some coal plants have already spent billions in compliance costs.

Earlier in 2018, EPA also issued the first of a planned two-part final rule intended to provide more flexibility to states and regulated facilities in the management of coal ash. In 2015 when the coal ash rule was finalized, multiple lawsuits were filed by both industry and environmentalists. Last August, shortly after EPA issued its proposed rule, the U.S. Court of Appeals for the D.C. Circuit sided with environmental groups by rejecting industry claims that the rule went too far and finding that the Obama-era rules did not go far enough, concluding that the rule did not require sufficient protections for unlined and partially-lined pits, and that some storage facilities had been improperly exempted. While it remains to be seen whether the D.C. Circuit's ruling will undermine the Agency's new proposal, environmental groups promptly challenged the new rules in the D.C. Circuit.

Clean Water Act

EPA plans to finalize a new rule that would clarify the scope of federal jurisdiction over waters of the United States, in accordance with President Trump's 2017 executive order entitled, "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule." In December of 2018, EPA and the Department of Army issued a proposed rule to revise the WOTUS definition, which would outline six clear categories of waters that would be considered "waters of the United States," as follows: (1) traditional navigable waters (such as large rivers, lakes, tidal waters and the territorial seas); (2) tributaries that flow to traditional navigable waters and are permanent or intermittent, but not ephemeral water features that flow only in direct response to snow or rain events; (3) jurisdictional ditches, including those that are traditional navigable waters, such as the Erie canal, or otherwise satisfy the conditions of the tributary definition and were either constructed in a tributary or were built in an adjacent wetlands; (4) certain lakes and ponds, including those that are traditional navigable waters, such as the Great Salt Lake or Lake Champlain, and those that contribute perennial or intermittent flow to a traditional navigable water,

or are flooded by a "water of the United States" in a typical year, such as oxbow lakes; (5) impoundments of "waters of the United States;" and, (6) adjacent wetlands, including those that physically touch other jurisdictional waters, those with a surface water connection that results from inundation from a "water of the United States," or perennial or intermittent flow between the wetland and a "water of United States."

The WOTUS rule would exclude from the definition of "water of the United States," ephemeral features that contain water only during or in response to rainfall, groundwater, ditches that do not meet the criteria necessary to be considered jurisdictional, prior converted cropland used in support of agricultural purposes, certain stormwater control features contracted in upland areas, certain wastewater recycling structures constructed in upland areas, and certain wastewater treatment systems. All in all, the agencies were seeking to offer clarity with the new rule, which they hope to achieve by removing the case-by-case reliance on Justice Kennedy's "significant nexus" test and providing clear-cut definitions of which waters are and are not covered. While the comment period for the rule will remain open for 60 days after publication, the rule has already been met with strong reactions and will likely garner significant comment from states, environmental groups, agricultural interests, and the industrial and development sectors.

Budget

As to EPA's budget, although the Trump Administration announced steep budget cuts for the Agency last year, those cuts have not been implemented. There have been some funding cuts, however, as the Office of Management and Budget shows spending by the EPA at $8.725 billion in 2016; $8.165 billion in 2017; and an estimated $7.916 billion in 2018. EPA's FY 2019 budget of $6.146 billion represents a further reduction from the previous year, while intended to ensure that the Agency will deliver on its goals of providing Americans with clean air, land, and water; ensuring chemical safety; promoting cooperative federalism; and administering the law in order to refocus the Agency on its statutory obligations as intended by Congress.

Enforcement

Although EPA's FY 2018 enforcement results have not yet been published, some independent analysts have concluded EPA reduced its efforts in 2018. For example, the Environmental Data and Governance Initiative, an advocacy group formed by university researchers, has concluded that EPA's enforcement activity steeply declined between 2017 and 2018, with 54 settled criminal cases in 2018, as compared to 87 in 2017, 81 in 2016, and more than 100 in every year between 2010 and 2015. On the civil enforcement front, the group also noted declines in the use of enforcement tools such as administrative penalty orders, administrative compliance orders, consent decrees, and Superfund administrative orders for cost recovery.

Personnel

Last July former Administrator Scott Pruitt resigned over a slew of spending and ethics scandals, and was replaced by Andrew Wheeler, a former coal industry lobbyist, as Acting Administrator. President Trump officially nominated Wheeler for the full-time post on January 9, pending confirmation from the Senate. In addition to the rulemaking activities discussed above, Wheeler continues former Administrator Pruitt's emphasis on addressing Superfund cleanups. Indeed, on November 20, 2018, EPA released a third revision to the Administrator's Emphasis List of Superfund Sites Targeted for Immediate, Intense Action. Administrator Wheeler has also announced that he intends to continue Pruitt's plan to pursue the controversial "science transparency" rule, which would require EPA to use peer-reviewed and reproducible scientific data and information where available, and ensure the regulatory science underlying its actions is publicly available. The Agency is now reviewing the almost 600,000 comments received on the proposed rule.

Conclusion
Finally, in the midst of EPA's regulatory rollback and other activities that will surely face scrutiny from states and environmental advocacy groups as we saw in 2018, we can also expect increased oversight from the Democrat majority in the House of Representatives in 2019. Party leaders in the House have identified climate change as a top priority for their terms, which may result in more aggressive oversight over any changes to rules affecting greenhouse gas emissions. Indeed, House Speaker Nancy Pelosi has revived the Select Committee on Energy Independence and Global Warming, which was eliminated in 2010 after Republicans took over the House. Representative Frank Pallone, D-NJ, will lead the House Energy and Commerce Committee, which could play a central role in scrutinizing the Trump administration's regulatory rollbacks.

Superfund Task Force Update

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2018 saw many changes at EPA, including the departures of EPA Administrator Pruitt and his chief lieutenant responsible for Superfund reform and the Superfund Task Force, Albert "Kell" Kelly. Nonetheless, the Superfund Task Force continued its work under the leadership of Deputy Assistant Administrator Steven Cook. After a series of EPA sponsored "listening sessions" in 2017 and 2018, on July 23, 2018, EPA issued the "2018 Update" to the Superfund Task Force Recommendations, approximately one year after the initial publication of the Task Force Recommendations.

Since his appointment, Deputy Assistant Administrator Cook has been meeting with stakeholders around the country to discuss the Superfund Task Force Recommendations, solicit input and plan next steps. At one of these meetings, Cook indicated that the Task Force would be wrapping up its work this summer as EPA turns its focus to implementation of the Task Force Recommendations. Acting Administrator Wheeler's forward to the 2018 Update to the Superfund Task Force Recommendations notes that "a key responsibility of [EPA] is cleaning up and revitalizing contaminated land and returning it to use so that communities can utilize and enjoy it. . . . The recommendations in the Superfund Task Force Report address barriers that delay cleanup and redevelopment of contaminated sites."

In 2019, EPA will continue to focus attention on the Superfund process and we can expect EPA to use the Superfund Task Force Recommendations as a blueprint for expediting cleanups and to encourage redevelopment of formerly contaminated sites.

NSR Reform Update

Michael Dillon, Esq.

2018 saw EPA take a series of actions meant to clarify, revise, and streamline the New Source Review (NSR) program, continuing the Agency's momentum from the previous year. NSR is a permitting program under the Clean Air Act that imposes preconstruction requirements on certain major sources of air pollutants. As part of the Trump Administration's regulatory reform agenda, EPA's Regulatory Review Task Force pointed to NSR as a program that too often imposes significant costs and regulatory uncertainty for subject facilities and identified seven program areas ripe for reform.

In March 2018, EPA issued a guidance memo entitled, "Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program," setting forth the Agency's interpretation of the way

emissions changes from a project should be accounted when determining if NSR applies. The March 2018 memo provides that emissions decreases, as well as increases, should be considered when determining if a project would be subject to NSR, clarifying an issue that has been approached inconsistently in the past.

Then in November 2018, EPA took a final action to restore a 2009 EPA action that described the principles of project aggregation that EPA would apply when determining if a source had unreasonably segregated a single project into multiple projects for purposes of avoiding NSR. The November 2018 final action completes the Agency's formal reconsideration of the 2009 action and reaffirms EPA's interpretation that only "substantially related" changes should be considered a single "project." Although EPA has styled both the 2009 and 2018 actions as "final," EPA has not proposed to revise the definition of "project" in the NSR regulations.

In addition to the above-mentioned NSR reform actions, EPA opened 2018 by issuing a January guidance memo withdrawing a 1995 memo known as "once in always in." While not directly related to NSR, the January memo is consistent with the goals of the Regulatory Review Task Force in that it is meant to provide flexibility to sources subject to Section 112 of the Clean Air Act by allowing former major sources of hazardous air pollutants to avoid major source requirements when they reduce their emissions below statutory thresholds, a practice prohibited by the 1995 memo.

As of the time of this writing, congressional efforts to amend the NSR program have proved futile, and EPA has not proposed to revise its NSR rules to incorporate its recent policy pronouncements. Therefore, while the regulated community may look favorably upon EPA's commitment to NSR reform, sources should be mindful that EPA's actions to date are only guidance that may be abandoned by a future administration. Likewise, state permitting authorities, which are tasked with reviewing and acting upon permit applications under the NSR program, do not have any obligation to adhere to the NSR guidance memos, or the memo reversing EPA's longstanding "once in always in" policy. Accordingly, source owners and operators need to evaluate carefully whether a proposed project would be feasible even if a state permitting agency declines to review the project through the lens of the recent reform memoranda. Moving forward, it is reasonable to expect EPA to take additional NSR reform actions, as the Agency has yet to address most of the items identified by the Regulatory Review Task Force. But given the lack of statutory and regulatory changes to date, the lasting impact of these NSR reforms remains to be seen

Federal Circuit Courts to Address Climate Change Claims in 2019

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2018 saw an increase in high-profile lawsuits alleging climate change-related claims against both private industry accused of creating products that aggravate the trend and governments accused of doing too little to address the issue. Federal appellate courts are likely to provide meaningful rulings on both types of cases in 2019.

In the first category, suits against private industry, state and local governments generally alleged state common law claims – public nuisance, trespass, unjust enrichment, etc. – against energy companies, seeking damages related to the current or future impact of climate change on the governments' infrastructure. In total, since 2017, eight municipalities in California and state and local governments in Colorado, Washington, New York, Rhode Island, and Maryland filed such suits.

Federal district courts in New York and California granted defendants' motions to dismiss in two such cases in 2018. The governmental plaintiffs appealed the decisions to federal circuit courts, where arguments will be heard in 2019. In *City of New York v. BP P.L.C.*, No. 18-2188, the Second Circuit will consider the City's arguments that it is entitled to pursue public nuisance and trespass claims against private energy companies that the City alleges contributed to global warming and forced the City to construct infrastructure improvements to combat the negative effects. The district court dismissed the City's claims, holding that the federal common law and the Clean Air Act displace the City's climate change-related state common law claims and that the climate change-related claims uniquely impact global, foreign policy and separation of powers issues that counsel against a federal district court's intervention. *City of New York v. BP P.L.C.*, 325 F.Supp.3d 466 (S.D.N.Y. 2018). The Second Circuit is likely to consider similar defenses on appeal.

In the Ninth Circuit, a number of municipalities continue to fight energy company defendants over whether the municipalities' climate change-related claims belong in state or federal court. In early 2018, two Northern District of California judges issued conflicting rulings granting and denying, respectively, municipalities' motions to remand their climate change-related state common law claims back to state courts. *Compare California v. BP P.L.C.*, No. C 17-06011, C 17-06012, 2018 WL 1064293 (N.D. Cal. 2018) (denying motions to remand); *County of San Mateo v. Chevron Corp.*, 294 F.Supp.3d 934 (N.D. Cal. 2018) (granting motions to remand). In both cases, federal jurisdiction hinged largely on whether the federal common law applied. In *California*, Judge William Alsup held that "Plaintiffs' nuisance claims—which address the national and international geophysical phenomenon of global warming—are necessarily governed by federal common law." 2018 WL 1064293, at *2.

In contrast to both *California* and the S.D.N.Y.'s decision in *City of New York*, Judge Vince Chhabria held in *County of San Mateo* that federal common law *did not displace* the municipalities' state common law claims because, as the U.S. Supreme Court held in *American Electric Power, Inc. v. Connecticut*, the federal common law was itself displaced by the Clean Air Act in federal climate change-related claims. 294 F.Supp. 3d at 937 (citing 564 U.S. 410 (2011)). Through the appeal of the consolidated *County of San Mateo* cases, the Ninth Circuit will soon weigh in on whether the eight California municipalities' state common law claims belong in state or federal court. *County of San Mateo v. Chevron Corp.*, No. 18-15499, 18-15502, 18-15503 (9th Cir.).

In the second category, suits against governments, various environmental groups or groups of young people generally alleged that state or federal governments violated the individual plaintiffs' constitutional rights by failing to adequately address climate change. The leading case is *Juliana v. United States*, No. 15-cv-1517 (D. Or.), in which a group of individual plaintiffs alleged claims against the United States under the Fifth Amendment, the Ninth Amendment, and the public trust doctrine. That case had been scheduled for trial on liability in early 2019, but in late November 2018, federal district Judge Ann Aiken granted on reconsideration the United States' request for certification for interlocutory appeal, after the United States Supreme Court granted the United States' request for stay of proceedings in *In re United States*, 139 S.Ct. 452 (2018). *Juliana v. United States*, No. 15-cv-1517, 2018 WL 6303774 (Nov. 21, 2018). Thus, rather than a trial on the merits at the district court level, the Ninth Circuit will address Judge Aiken's original opinion denying the United States' motion to dismiss in 2016. *See Juliana v. United States*, 217 F.Supp. 3d 1224 (D. Or. 2016) (denying United States' motion to dismiss).

While the flurry of additional climate change-related cases seems likely to continue into 2019, the fate of all these cases may turn in the near term on the rulings issued by the Second and Ninth Circuits in 2019.

The Birds and the Bees - Update on Endangered Species Act Protections

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The United States Fish and Wildlife Service has proposed a series of three changes to the Endangered Species Act's implementing regulations with the intention of simplifying and clarifying certain procedures under the Act. 83 Fed. Reg. 35174-35201 (July 25, 2018)

One of the changes relates to the procedures for designating critical habitat for threatened and endangered species. The proposal would reinstate the requirement that the Service must first evaluate areas currently occupied by the species before considering whether unoccupied areas are essential to the conservation of the species, and provides a list of conditions where designation of an area for a particular species would not be prudent. The proposal would further remove a provision prohibiting the consideration of economic consequences when designating critical habitat. While the Service states that decisions will continue to be made using biological information, economic concerns could also be raised.

The Service further proposes changes to the way in which a species may be designated as "threatened." The Act defines a threatened species as one that is likely to be in danger of extinction within the "foreseeable future." The Service proposes to interpret the term "foreseeable future" to make it clear that both future threats and the species' responses to those threats must be reasonably determined to be probable. The proposal would also clarify that decisions to delist a species should be made using the same standard for listing species.

Finally, the proposed rule would simplify and clarify the definition of "destruction or adverse modification," which is relevant to Section 7 consultations between federal agencies and the Service. The proposal would remove language the Service considers redundant and confusing and clarify whether and how the Service considers proposed measures to avoid, minimize, or offset adverse effects to listed species or their critical habitat.

In addition to the aforementioned changes, the Service is proposing to rescind its blanket rule under Section 4(d) of the Act which automatically conveys protections for endangered species to threatened species unless otherwise specified. The proposed change would impact only future listings and would not apply to those species already listed as threatened. The Service would develop species-specific conservation rules for each threatened species determined in the future.

Hazardous Waste e-Manifest System Implementation Update

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

EPA officially launched its national system for tracking hazardous waste shipments electronically on June 30, 2018. This system, known as "e-Manifest," was anticipated to modernize the cradle-to-grave hazardous waste tracking process while saving time, resources, and costs for industry and states. The e-Manifest system is expected to impact approximately 160,000 entities who generate, transport, and manage hazardous wastes across the nation. Although strongly discouraged, the use of paper manifests is still allowed for generators and transporters of hazardous waste, with the burden for compliance with the e-Manifest system primarily falling onto receiving facilities. By now, all receiving facilities of manifested hazardous wastes must be registered and utilize the e-Manifest system by entering each manifested shipment into the system or mailing a paper version to EPA for manual data entry. As of late 2018, over

one half million manifests were already entered into the e-Manifest system, with many thousands more paper manifests awaiting entry into the e-Manifest system by EPA staff.

The e-Manifest fees are primarily the responsibility of receiving facilities and range between $5 (for electronic submittals) to $15 (for paper manifests mailed). EPA is not charging user fees to generators, transporters, or brokers as user fees will be only assessed to receiving facilities for each manifest submitted. The receiving facilities responsible for payment of e-Manifest fees will receive an electronic copy of their invoice on the first day of the month after manifests were submitted to EPA. Facilities then must pay their invoice in full within the same calendar month it was received.

The roll-out of the e-Manifest system has not come without it's issues, as industry representatives and the regulated community initially struggled with utilization of the system. This has been especially true for receiving facilities, many of whom had not completed the necessary modifications to their software systems to properly integrate with e-Manifest. This has prompted some receiving facilities to simply mail paper manifests to the EPA for manual entry by EPA staff, thus resulting in the larger e-Manifest fees being passed onto their generator customers.

EPA plans to continue its outreach on the e-Manifest system through a website, webinars, stakeholder meetings, and other methods. The agency has also been helping states, including aligning state manifest practices with the new system, adopting the federal rules, and engaging regulated entities.

2018 Supreme Court Cases Suggest Narrow View of Agency Deference Under *Chevron*

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In 2018 the Supreme Court issued multiple opinions that narrow the *Chevron* doctrine of agency deference and suggest the Court could expressly limit the doctrine in future cases. In the 1984 case *Chevron v. Natural Resources Defense Council, Inc.*, the Supreme Court held that courts should defer to a federal agency's reasonable interpretation of an ambiguous statutory provision. 467 U.S. 837, 104 S. Ct. 2778 (1984). That holding is best understood in two parts. First, the court determines whether the statute under which the agency acted is ambiguous. If the text is clear, the court asks only whether the agency complied with the statute and does not defer to the agency. But if the text is open to multiple interpretations, the court moves on to the second step in the analysis and determines whether the agency's interpretation is reasonable. If it is, the court defers to the agency's interpretation, even if it is not the one that the court would have adopted in the first instance.

Many have criticized *Chevron* deference since its inception, including Supreme Court Justices Thomas and Gorsuch, arguing that it places judicial power in the hands of executive agencies. And a week before his retirement, Justice Kennedy suggested in a concurring opinion that the Court revisit the doctrine and clarify its application. Despite that call, the Court did not take a case in 2018 that directly addresses the continued validity of *Chevron*. It did, however, decide five cases under *Chevron* that imply a narrower view of the doctrine. In each case, the Court concentrated on step one of the analysis and concluded that the statutory text was unambiguous. By deciding the cases at step one, the Court never reached the question of agency deference.

Whether the Court will take a more explicit stance on *Chevron* anytime soon remains uncertain. But regardless of whether the Supreme Court accepts a case on the issue, the trend in 2018 demonstrates that the Court is interested in moving away from the broad deference that has characterized the *Chevron* doctrine in the past. And that move suggests that even if *Chevron* remains on the books, federal agencies could face a more probing eye from the judiciary in the future.

PENNSYLVANIA FORECAST

Applying the Environmental Rights Amendment in 2019

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In 2018, Pennsylvania courts and the Environmental Hearing Board continued to fill in gaps left by the Pennsylvania Supreme Court's decision in 2017 in *Pa. Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911 (Pa. 2017) (*PEDF*), which established what some view as a heightened standard of review for challenges brought under Pennsylvania's Environmental Rights Amendment.

The Environmental Rights Amendment (ERA), (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* focused on the text of the ERA and split it into two parts. The first sentence is often referred to as the "individual right," and the second and third sentences are often collectively referred to as the Commonwealth's "trustee obligations." The Court in *PEDF* found that the General Assembly failed to fulfill its trustee obligations under the ERA by allocating revenues from oil and gas leases on state-owned lands for general budgetary purposes rather than for environmental conservation.

Shortly after *PEDF*, the Pennsylvania Environmental Hearing Board addressed the ERA in the environmental permitting context and established a framework for determining whether the Pennsylvania Department of Environmental Protection (PADEP) complied with the ERA. *Center for Coalfield Justice v. DEP*, 2017 EHB 799. The Board emphasized that the ERA Constitutional standard is not coextensive with regulatory compliance, but the practical effect of the Board's holding was that regulatory compliance resulted in ERA compliance and regulatory noncompliance resulted in ERA noncompliance. The Board continued this trend through 2018. *See, e.g.*, *Logan v. DEP*, EHB Docket No. 2016-091-L (Adjudication issued Jan. 29, 2018); *Center for Coalfield Justice v. DEP*, EHB Docket No. 2018-028-R (Opinion issued Apr. 24, 2018). It is still unclear what, if any, set of unique facts would lead the Board to find that PADEP complied with all applicable laws and regulations but still violated the ERA. Ultimately, it will likely take an appeal to the Commonwealth Court, and perhaps even to the Pennsylvania Supreme Court, to decide the scope of PADEP's obligations under the ERA, and currently no such appeal is pending.

One question left open by the Pennsylvania Supreme Court in *PEDF* is the extent to which the ERA imposes obligations on municipalities and state agencies other than PADEP. On October 26, 2018, the Commonwealth Court largely answered that question when it held that municipalities lack the authority to regulate in the areas of environmental protection reserved to PADEP. *Frederick v. Allegheny Twp. Zoning Hearing Bd.*, No. 2295 C.D. 2015 (Oct. 26, 2018). In *Frederick*, the Commonwealth Court upheld a zoning ordinance that rendered oil and gas development a permitted use by right in all zoning districts, including residential and agricultural districts, subject to certain standards related to safety and security. The Court found that, "as a creature of statute, the Township can exercise only those powers that have been expressly conferred upon it by the General Assembly." To that end, the Court stated that zoning necessarily requires municipalities to account for the natural, scenic, historic and esthetic values of the environment. But as to the remaining environmental issues covered by the Environmental Rights Amendment – i.e., clean air and pure water – the Court found that "[m]unicipalities lack the power to replicate the environmental oversight that the General Assembly has conferred upon DEP and other state agencies." Ultimately, the Court held that, "a municipality may use its zoning powers only to regulate *where* mineral extraction takes place," but a "municipality does not regulate *how* the gas drilling will be done." The Pennsylvania Supreme Court is almost certain to weigh in on this case sometime in 2019.

Update on Revisions to Pennsylvania DEP's Management of Fill Policy

Michael M. Meloy, Esq., Darryl D. Borrelli, Michael C. Nines, P.E., LEED AP, and William Hitchcock

On November 10, 2018, PADEP published a notice in the Pennsylvania Bulletin announcing its intention to make substantive revisions to its Management of Fill Policy. The Management of Fill Policy serves a critically important role in distinguishing between fill material that is regulated as a waste under Pennsylvania's Solid Waste Management Act ("regulated fill") and material that can be handled and used outside the purview of the waste regulations ("clean fill"). Comments were due by January 8, 2019 and PADEP will be considering these comments before finalizing the revisions, probably some time later in 2019.

The proposed revisions to the Management of Fill Policy include significant modifications to the current standards and procedures for determining whether fill material is clean fill or regulated fill. The proposed changes will have broad impacts within the regulated community, affecting, among others, state and local governmental entities, real estate developers, land owners, landfills, utilities, roads, railroads, port operators, and excavation contractors. Activities and projects involving earth disturbance and excavation work including Brownfields projects, development projects, infrastructure projects and utility projects will be significantly impacted by the proposal. Indeed, it is hard to imagine a more important or far-reaching guidance document that PADEP has developed.

Our firm has been closely following PADEP's efforts to modernize this policy, which has not been substantially updated since 2004. We have prepared and submitted comments on behalf of many of our clients across a broad range of industries and will continue to track PADEP's progress in this important effort.

Pennsylvania Storage Tank Facilities to Navigate New Regulatory Requirements in 2019

Rodd W. Bender, Esq. and William Hitchcock

On December 22, 2018, revisions to Pennsylvania's Storage Tank and Spill Prevention Program regulations (25 Pa. Code Chapter 245) went into effect, strengthening many of the operation and maintenance ("O&M") requirements for underground storage tank ("UST") systems. These changes ensure that Pennsylvania's regulations are no less stringent than the federal regulations, which were substantially updated in 2015. In addition to the strengthened O&M requirements, the updated regulations also create a new, intermediate certification level for tank installers, as well as significantly increasing the types of releases that must be reported to PADEP.

The new O&M requirements are aimed at preventing releases from tank systems by increasing the frequency of inspections and testing of release detection and spill prevention equipment, as well as adding or replacing equipment in some cases. Some of these requirements provide grace periods for tank owners and operators to achieve compliance, and others do not. The new category of certified tank installer may perform minor modifications to UST systems, and was created in an attempt to offset some of the increased costs resulting from the expanded testing that is now required for many UST system components. Note that the revisions also increase certain inspection obligations for aboveground storage tanks.

One of the more significant impacts of the revised regulations, from the perspective of the regulated community, is likely to be the new release reporting requirements. These changes expand the reporting requirements to include releases to containment structures in many instances, even though such structures are typically designed to prevent releases from reaching the environment. Under the new rules, releases from regulated storage tank systems into containment structures are reportable if they equal or exceed reportable quantity or discharge thresholds established under the federal Superfund and Clean Water Act statutes. The reporting requirements also include releases of petroleum to containment structures in any amount, except for releases less than 25 gallons or below the lowest penetration of a containment sump, when certain conditions are met.

Storage tank system owners and operators should familiarize themselves with the new reporting requirements immediately, as there is no grace period for compliance with the new requirements, and the timeframe for reporting a qualifying release is as soon as practicable (and no later than 24 hours) after confirmation.

Pennsylvania’s Cleanup Standards – Are More Changes on the Way?

Darryl D. Borrelli

2018 saw significant changes to Pennsylvania’s cleanup standards (Statewide Health Standards (SHS)) for several contaminants including aldrin, beryllium, and cadmium. The changes were prompted by PADEP’s review of the methods by which their standards are calculated and to reflect accurate information on the toxicity of these chemicals.

For those involved in site remediation, the changes were mostly welcomed as the cleanup standards were substantially increased for two metals that are commonly naturally present in Pennsylvania soils at

concentrations exceeding the former cleanup standards. The revisions brought a significant reduction in the standard for aldrin; however, this pesticide is found infrequently at most sites.

Other metals that are commonly found in Pennsylvania soils at concentrations exceeding their current PADEP cleanup standards, such as vanadium, are also in need of a review by PADEP to ensure the accuracy of the basis for the establishment of their cleanup standards. The natural presence of these metals, especially at residential developments, complicates the site remediation process and often is confusing to the public. Because proposed changes to Pennsylvania's Management of Fill policy will soon incorporate the SHS, having reliable standards, especially for naturally occurring metals, will greatly simplify the process for site cleanup and redevelopment efforts.

Given the national focus on emerging contaminants, especially per- and polyfluoroalkyl substances (PFAS), questions have arisen about whether Pennsylvania will develop cleanup standards for these compounds in the absence of national standards. Unlike other states, Pennsylvania does not establish independent toxicologic data upon which cleanup standards can be based. Under the Land Recycling and Environmental Remediation Standards Act (Act 2), PADEP must look to a hierarchy of toxicological data sources, including those published by California, for establishing standards and making recommendations for new standards to the Environmental Quality Board. We think it is unlikely that the process will occur in calendar year 2019; however, PADEP will likely lay the groundwork for such standards this year for potential adoption in 2020.

PADEP to Consider Draft Air Emission Rules for Existing Oil and Gas Sources

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In December 2018, PADEP rolled out draft rules that would impose new air emission controls on existing oil and gas sources. The draft rules are based upon Control Technique Guidelines (CTG) issued by EPA in 2016 as part of the Obama administration's Climate Action Plan Strategy to Reduce Methane Emissions. Under the Clean Air Act, the CTGs act as guidance to states that are in moderate or severe nonattainment for ozone and are therefore required to develop reasonably achievable control technology (RACT) requirements for sources of volatile organic compounds (VOCs). As a state in the Northeast ozone transportation region, Pennsylvania is required to adopt and submit regulations that implement RACT for any source of VOC covered by a CTG.

The CTG issued in 2016 was based, in large part, on a New Source Performance Standard (NSPS) promulgated by EPA in May 2016. EPA, however, commenced a process to reconsider the NSPS in June 2017 and proposed revisions to it in October 2018. As part of the reconsideration, EPA has stated that it will continue to review broad policy issues in the May 2016 rule, including the regulation of greenhouse gases from the oil and gas sector. In light of the NSPS reconsideration, EPA proposed a withdrawal of the CTG in March 2018. In response, PADEP submitted comments that argued against withdrawal of the CTG. Notwithstanding the proposed withdrawal of the CTG and revisions to the May 2016 rule, PADEP has chosen to move forward with a proposed RACT rule that largely adopts the 2016 CTG. The draft RACT rule covers various oil and gas sources including storage vessels, natural gas-driven pneumatic controllers, natural gas-driven diaphragm pumps, compressors, and fugitive emission components at well sites, natural gas processing plants, gathering and boosting stations. PADEP's proposed RACT rule, however, requires more frequent initial leak monitoring and applies a stricter control applicability threshold to storage vessels installed on or after August 10, 2013. The draft RACT rule does not directly regulate methane emissions,

but PADEP has asserted that the VOC controls will also reduce methane emissions from existing oil and gas sources as a co-benefit.

Industry groups have urged PADEP to hold off on moving forward with the proposed RACT rule until EPA takes formal action on the 2016 CTG. Environmental groups, on the other hand, have referenced Governor Wolf's 2016 methane reduction strategy for the oil and gas industry in Pennsylvania, and urged DEP to press forward using the agency's authority under the Pennsylvania Air Pollution Control Act. For its part, PADEP has indicated that it currently intends to move ahead with the draft RACT rule in 2019, in part to demonstrate that VOC emission reductions from existing oil and gas sources are technically and economically feasible, and will reevaluate its authority to issue the RACT rule under state law if and when EPA changes or withdraws the 2016 CTG.

Climate Change Petition Calls for Cap-and-Trade Program in PA

Thomas D. Duncan, Esq.

On November 27, 2018, a group of over sixty individuals and organizations, including environmental groups and academics, submitted a rulemaking petition requesting that the EQB establish a cap-and-trade program to reduce greenhouse gas (GHG) emissions in Pennsylvania. For a more detailed explanation of this petition, please refer to our prior article.

The proposed Pennsylvania cap-and-trade program would cap GHG emissions from certain categories of sources, with the cap declining each year by 3 percent of 2016 emission levels. This 3 percent reduction would ultimately result in net zero GHG emissions by 2052. PADEP would distribute allowances equal to the cap, with each allowance equal to one metric ton of CO_2 equivalent (CO_2e). Most of the allowances would be distributed through an auction and could be freely traded in an open market. Three categories of sources would be required to obtain and surrender their allowances each year and participate in the auction: (1) sources that are required to report their direct emissions under EPA's Mandatory Greenhouse Gas Reporting Rule, which includes a broad range of facilities in a number of industries, including petroleum, natural gas, cement, glass, iron, steel, landfills, and lead production; (2) distributors of fossil fuels in Pennsylvania; and (3) entities that deliver electricity to Pennsylvania generated with fossil fuels at facilities outside of Pennsylvania.

The petitioners assert that the EQB has the authority and duty to promulgate the proposed regulation under Article I, Section 27 of the Pennsylvania Constitution, also known as the Environmental Rights Amendment, as well as under the Pennsylvania Air Pollution Control Act. This is the second petition submitted to the EQB in the past five years asking the EQB to establish a program to reduce GHG emissions. The EQB, under the Corbett administration, rejected the prior petition, which had requested a 6 percent reduction in CO_2 emissions per year until 2050, explaining that a plan to reduce GHG emissions requires a national solution and that PADEP is already taking some measures to reduce GHG emissions.

Shortly after the petition was submitted, Governor Wolf publicly stated that he is considering whether to support the petition. Then, on January 8, 2019, Governor Wolf signed an executive order setting a statewide goal of reducing GHG emissions by 26 percent by 2025 and 80 percent by 2050 from 2005 levels, which are the same levels of reduction outlined in the Paris Climate Agreement. In 2019, expect PADEP to deliberate internally and potentially request feedback from stakeholders on the merits of the petition and PADEP's constitutional and statutory authority to enact such a rulemaking.

Proposed NPDES Program Fee Amendments

Megan A. Elliott, Esq.

At a December 2018 meeting of the EQB, PADEP proposed to amend the fee schedule for National Pollutant Discharge Elimination System (NPDES) permit applications under 25 Pa. Code Chapter 92a. PADEP's proposal would 1) significantly increase fees for NPDES permit applications and annual fees; 2) clarify the fees applicable to No Exposure Certifications and waivers; and 3) create a fixed date for payment of annual fees. Although PADEP modified its NPDES permit application fee schedule in 2010 (increasing amounts due in some instances), an August 2018 report to the EQB showed that the program's revenue is still falling short of expenses.

PADEP proposes to increase fees across almost every category of NPDES permits. For example, the application fee for a new, individual NPDES permit for a major facility discharging more than 5 MGD (million gallons per day) of treated sewage would increase from $5,000 to $10,000; and the fee for a new, individual industrial stormwater permit would increase from $2,000 to $5,000. Annual fees would see increases as well, often doubling the amounts currently due.

The proposed rule also would clarify that industrial facilities seeking No Exposure Certifications and municipal separate storm sewer systems (MS4s) seeking waivers must submit a formal application and pay the corresponding fee. For example, under the new rule, an MS4 seeking a waiver must submit the $5,000 fee for MS4 individual permit applications along with its application for waiver. Lastly, the proposed rule would create a fixed date for the payment of annual fees, which means that annual fees would be due on the same date each year, based on the latest issued permit's effective date.

PADEP reports that the fee increases could bring in an additional $7 million per year to the NPDES program, money which PADEP says will be used to fund new positions, such as inspectors and biologists, and in turn speed up the permitting process.

The regulated community should know that PADEP recommends a 45-day public comment period, and at least one public hearing. As of this writing, however, the EQB has not yet acted on PADEP's proposal. Therefore, there is no officially-published proposed rulemaking and no set public comment period. Stay tuned for additional updates as they become available.

PFAS Action Team Update

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

In September 2018, Pennsylvania Governor Tom Wolf signed an executive order forming a Per- and Polyfluoroalkyl Substances (PFAS) Action Team, which will be responsible for developing a comprehensive response to identify and eliminate sources of PFAS contamination. The Action Team will be led by the secretaries of Environmental Protection, Health, Military and Veteran Affairs, Community and Economic Development, Agriculture, and the State Fire Commissioner. Their efforts will specifically address strategies to deliver safe drinking water and minimize risks from firefighting foam and other PFAS sources, manage environmental contamination, create specific site plans, explore funding for remediation efforts, and increase public education. Thus far, the Action Team held an initial public meeting on November 30, 2018, with plans to hold a second public meeting tentatively set for February 12, 2019. At the initial public meeting, PADEP Secretary Patrick McDonnell referenced the Commonwealth's plans to institute soil and groundwater cleanup standards for PFOS and PFOA compounds in an upcoming rulemaking.

For Federal and New Jersey issues relating to PFAS, see the article on PFAS in the New Jersey Section of the MGKF 2019 Environmental and Energy Law Forecast

Final Rulemaking for Triennial Review of Water Quality Standards Could Come in 2019

Shelby Hancock, Esq.

Under section 303(c)(1) of the Federal Clean Water Act, states are required every three years to review and revise state water quality standards. The Pennsylvania Environmental Quality Board (EQB) published a proposed rulemaking on the most recent triennial review in October 2017. Among other changes, the proposed regulation would adopt federally-recommended criteria for ammonia and fecal coliform, and would incorporate EPA's recommended updates to Table 5 of § 93.8(c), which lists human health and aquatic life criteria for toxic substances. Of the 94 individual criteria recommended by EPA, the EQB proposes to adopt 73, retain 10 that are the same as EPA's, and add 11 new compounds.

The public comment period for the proposed regulation closed on February 16, 2018. A month later, Pennsylvania's Independent Regulatory Review Commission (IRRC) submitted its own comments on the proposed rulemaking. IRRC expressed concern over the EQB's decision to adopt EPA's national criteria for many of the constituents. IRRC questioned whether a site-specific approach was more appropriate and asked the EQB to compare its approach to that taken by neighboring states. In addition to those specific comments, IRRC requested a more robust fiscal analysis of the financial impact of the proposed rulemaking on the regulated community.

The EQB has two years from the close of the public comment period to prepare a final-form rulemaking and written responses to all comments. That two-year deadline suggests we could see a final regulation in 2019.

NEW JERSEY FORECAST

Changes in the Offing for the NJ Site Remediation Reform Act?

Bruce S. Katcher, Esq.

It finally seems likely that we'll see some changes to the Site Remediation Reform Act (SRRA) in 2019, however the nature and extent of those changes continues to be a matter of speculation.

At the behest of Senator Smith, the "father" of SRRA and the licensed site remediation professional (LSRP) program that it created, various stakeholder groups met with NJDEP throughout 2108, trying to come up with a set of consensus modifications to the ten-year-old statute.

Among the more controversial topics that have been explored, but which seem lacking in any consensus are (1) providing additional flexibility to adjust or exit from the direct oversight process, (2) expanding public notification requirements and public access to LSRP files, (3) expanding and clarifying discharge reporting obligations (including those for immediate environmental concerns and discharges discovered during a buyer's pre-purchase due diligence), (4) modifying the ISRA remediation funding surcharge requirement to

cover those who provide a self-guarantee, (5) tightening the requirements surrounding what it means for an LSRP to exercise its "independent professional judgement" and several other LSRP Board sponsored changes designed to address what the Board perceives to be potential abuses of the LSRP program.

Among the above, only the changes addressing discharge reporting obligations, reportedly favored by Senator Smith notwithstanding the absence of consensus, seem to show some potential at this time, assuming the Senator sticks to his other reported intention of moving only consensus changes.

Non-controversial modifications, which seem likely to be part of any bill, include adding surety bonds as a permitted ISRA remediation funding source, reducing the number of required electronic copies of LSRP records to be submitted to NJDEP from three to one, eliminating language dealing with the former temporary LSRP licensing program, clarifying LSRP record retention requirements and a possibly a few minor changes to LSRP qualification requirements that could expand the pool of eligible LSRP candidates.

Other controversial topics proposed by stakeholders that NJDEP has declined to consider and seem unlikely to see the light of day under the current legislative effort are (1) liability relief for volunteer remediators and bona fide prospective purchasers, (2) improvements to the remedial action permitting process and financial assurance requirements, (3) greater flexibility for addressing "non-discharge conditions" such as historic fill, historically applied pesticides, etc., and (4) acceptance of risk-based remediation strategies.

The final shape of the legislation is expected to be determined during the first quarter of 2108, with a bill likely to be introduced in the first half of the year. We will continue to closely track its progress.

Establishing Standards for Per- and Polyfluoroalkyl Substances (PFAS) Levels

John F. Gullace, Esq.

Per- and polyfluoroalkyl substances, collectively referred to by the abbreviation PFAS, continue to grab headlines as communities across the country worry about the safety of their drinking water. This family of more than 3,000 man-made compounds that made their way into manufacturing in the 1940s and 1950s are stable, mobile, persistent, bio-accumulative and seemingly ubiquitous. Public concern and the need to regulate PFAS has, in many respects, outpaced the study of PFAS, and regulators are grappling with determining the toxicity of individual PFAS compounds and establishing safe exposure levels.

In 2009, the Federal Government established a short-term provisional health advisory for two PFAS compounds - PFOS and PFOA - of 200 ppt and 400 ppt respectively. In 2016, the Federal Government upped the ante by issuing a lifetime health advisory for these two PFAS compounds of 70 ppt, but these are just advisory standards. Meanwhile in 2018, EPA conducted "listening sessions" around the country and Congress held hearings on the topic of regulating PFAS. By most estimations, EPA is still years away from setting maximum contaminant levels for individual PFAS compounds, but increasingly, EPA is requiring responsible parties to sample for PFAS compounds during five-year reviews at Superfund sites.

The States have been filling the void with a patchwork of inconsistent standards. As of last summer, 18 States had standards for one PFAS compound or another and New Jersey remained at the vanguard of State efforts to set limits on PFAS compounds in drinking water.

In September of 2018, New Jersey established a maximum contaminant level (MCL) for one PFAS compound known as PFNA. Under the New Jersey Safe Drinking Water Act, PFNA now has an MCL of 13 ppt and public water systems in New Jersey will begin sampling for PFNA during the first quarter of 2019. In addition, the New Jersey Drinking Water Quality Institute (DWQI) has recommended health-based MCLs for PFOA of 14 ppt and PFOS of 13 ppt, far lower than the Federal advisory levels of 70 ppt. We can expect these New Jersey DWQI recommendations to become MCLs.

In 2019, we can expect New Jersey to press forward with its aggressive health-based standards for other PFAS compounds in drinking water. Because New Jersey is at the forefront of the efforts to regulate and remediate PFAS, we will also likely see several technical issues play out in New Jersey as utilities grapple with sampling for PFAS compounds in the parts per-trillion and the best strategies for remediating PFAS contamination. Parties responsible for remediating contaminated sites will also be required to investigate and, if necessary, remediate PFAS to these very low levels. We can expect other States to follow New Jersey's lead in the efforts to address PFAS contamination and limit exposure to PFAS.

What's in the Air in New Jersey?

Carol F. McCabe, Esq.

In 2019, we can expect continued high levels of activity in New Jersey's air quality program. NJDEP has been busy implementing the new reporting thresholds finalized in last year's RATE rulemaking, and has also finalized updates to Technical Manual 1002 *Guidance on Preparing an Air Quality Monitoring Protocol*, and Technical Manual 1003 *Guidance on Preparing a Risk Assessment for Air Contaminant Emissions*. NJDEP also continues to work on changes and updates to its Risk Screening Worksheet, including clarifying changes to the Worksheet guidance and instructions governing use of the Worksheet in lieu of a refined health risk assessment. The Worksheet also clarifies that where a refined health risk assessment is required, the applicant may opt to have the Department perform the assessment (and the submittals that are required to support such assessment) or may opt to perform the assessment itself in accordance with Technical Manuals 1002 and 1003. Other updates to the Worksheet will focus on the methodologies used to determine the Worksheet's health risk outputs, with further discussion of these updates anticipated to occur at February's Industrial Stakeholder Meeting.

NJDEP continues to work on new and revised general permits, including the revised general permit GP-016A (Manufacturing and Materials Handling Equipment) and the new GP-015A (Plating, etching, pickling and electropolishing operations), which are now available for use. Other general permits are also in the works for 2019. The Department announced a new Startup Shutdown and Malfunction guidance for permitting, available here. With respect to new guidance from EPA, NJDEP has stated that it will not follow EPA's January 2018 Once In/Always In policy, but will continue to follow EPA's 1995 policy on this subject.

Most recently, NJDEP has announced its intention to commence a rulemaking process that will (1) clarify permit applicability for fumigation operations; (2) evaluate the addition of hydrogen sulfide, sulfuryl fluoride and n-propyl bromide to NJDEP's list of hazardous air pollutants governed under Subchapter 17; and (3) evaluate a requirement to report additional substances through emission statements, based on its review of the relative risk of substances emitted by permitted facilities not currently required to be reported. NJDEP has extended invitations to a stakeholder meeting in January to discuss these potential rulemaking items.

New Jersey Taking Steps to Address Greenhouse Gas Emissions

Michael Dillon, Esq.

The end of 2018 saw New Jersey continue to take aggressive steps to implement one of Governor Murphy's major policy priorities, reducing the state's greenhouse gas emissions. On December 17, 2018, NJDEP proposed two rules meant to provide a framework for reentering the Regional Greenhouse Gas Initiative (RGGI), a multi-state, market-based program that establishes a regional cap on CO_2 emissions and requires fossil fuel power plants with a capacity greater than 25 megawatts to obtain an allowance for each ton of CO_2 they emit annually. New Jersey had previously participated in RGGI beginning in 2008, but withdrew from the program in 2012 under the direction of the Christie Administration.

The proposed set of RGGI Rules would establish the New Jersey Carbon Dioxide (CO2) Budget Trading Program, a cap-and-trade program that would set a state-wide carbon budget for large fossil fuel electric generating units (EGUs) and would require such sources to possess CO_2 allowances equivalent to their annual emissions, which could be obtained through quarterly allowance auctions. EGUs with a generating capacity over 25 megawatts would need to possess adequate CO_2 allowances beginning in 2020. The rulemaking package would further establish the Global Warming Solutions Fund, which would provide for a set of standards for the allocation and use of funds generated through the sale of CO_2 allowances. A public hearing on the RGGI Rules is scheduled for **January 25, 2019**, with written comments on the rulemaking package due to NJDEP no later than **February 15, 2019**.

New Jersey is also focusing on the state's largest source of greenhouse gas emissions, the transportation sector, having announced at the end of December the state's plan to participate in the Transportation Climate Initiative (TCI), a regional program similar to RGGI that will attempt to reduce greenhouse gas emissions from mobile sources of pollution such as cars and trucks. In a December 18, 2018 statement ratified by nine Northeast states (including New Jersey and Pennsylvania) and the District of Columbia, TCI announced the commencement of a joint effort to establish a regional low-carbon transportation policy that "would cap and reduce carbon emissions from the combustion of transportation fuels through a cap-and-invest program or other pricing mechanism."

Participating TCI states could then use the proceeds from such program to reinvest in a low-carbon transportation infrastructure. The TCI is currently in the planning stages, but the group expects to develop a final policy by the end of 2019. Like RGGI, states will have the option to implement TCI's policy proposals through the adoption of rules in their respective jurisdictions. Participation in the TCI builds on the momentum of NJDEP's Green Drive initiative, a program that encourages the use of electric vehicles and the establishment of the necessary infrastructure through mechanisms such as tax incentives for the purchase and use of electric vehicles and grant programs for the installation of electric vehicle charging stations.

As 2019 progresses, we will continue to track New Jersey's development of the RGGI Rules and its participation in the TCI, as well as any other efforts to implement programs to address greenhouse gas emissions from sources within the state.

New Jersey and Natural Resource Damages in 2019

Nicole R. Moshang, Esq. and Maria C. Salvemini, Esq.

This year practitioners and the regulated community will see how the natural resource damage (NRD) initiative that New Jersey kicked off in late 2018 will shape the law concerning NRD claims moving forward. NRDs compensate the state for injury to natural resources. In August 2018, New Jersey's Attorney General announced the filing of three lawsuits seeking NRDs—Pohatcong Valley Superfund, Port Reading refinery, and Deull Fuel Company—touting the move as a "New Day" in the state's environmental enforcement. The state announced the filing of another NRD lawsuit, the Puchack Wellfield matter, in December 2018. These four lawsuits are the first NRD cases that New Jersey has brought in a decade, although the state has publicly committing to pursuing additional NRD claims in the coming months.

The state's commitment to pursue additional enforcement claims, including NRD, is buttressed by the organizational changes recently announced at both the state's Attorney General's Office (AG's Office) and the New Jersey Department of Environmental Protection (NJDEP). Specifically, the AG's Office announced the creation of an Environmental Enforcement and Environmental Justice Section to handle the anticipated uptick in environmental enforcement actions. In addition, NJDEP announced the hiring of Shawn M. LaTourette to serve in the newly created position of Deputy Commissioner for Legal and Regulatory Affairs, who will be tasked with overseeing the revival of NJDEP's efforts to recover NRDs.

It seems likely, however, that NJDEP will be confronted with many of the same or similar legal challenges it faced in pursuing its earlier NRD initiative. Indeed, several early motions were filed in the three earliest filed NRD cases primarily challenging the scope and viability of the state's common law claims seeking NRD. For example, defendants in the *NJDEP v. Hess Corp.* case (relating to the Port Reading refinery) moved to dismiss the state's trespass and strict liability claims, and to dismiss the public nuisance claim to the extent it sought monetary relief rather than abatement. In December 2018, the Superior Court granted with prejudice defendants' motion to dismiss the trespass claim, holding that the state did not have a claim because it lacked exclusive possession. With respect to public nuisance, the court found that the state could not recover monetary relief as a remedy because the only available remedy was abatement. Moreover, the court found that the state's strict liability claim failed because there was no binding New Jersey authority to support the proposition that the storage and processing of crude oil and refined petroleum products constitute an abnormally dangerous activity and that the state's strict liability claim was otherwise subsumed by its claims for statutory relief and remedy under the New Jersey Spill Compensation and Control Act. There are also motions to dismiss on similar grounds pending in the Pohatcong Valley and Deull Fuel matters, which are scheduled for oral argument in early 2019. The four NRD lawsuits will likely have a significant role in shaping how NRD cases are litigated in New Jersey.

Some of the anticipated legal challenges may be addressed through ongoing legislative efforts focused on developing objective standards for evaluating and calculating recoverable NRDs. Specifically, Senator Bob Smith convened an NRD Task Force comprised of NJDEP officials, industry representatives, NRD practitioners and environmental advocacy groups in the summer of 2018. The purpose of the Task Force was to develop suggestions on topics such as NRD policy and how to value NRDs. Although the state developed a formula to calculate groundwater injury previously in connection with its first NRD initiative launched in the early 2000s, it has been rejected by the courts (see *NJDEP v. Exxon*, Mer-L-2933-02 (N.J. Super. Law Div. Aug. 24, 2007)) and there are currently no regulations regarding how to calculate NRDs. At the December 2018 NJICLE Annual Review of New Jersey Environmental Law, representatives of

NJDEP publicly announced that that they are working to finalize an objective formula for calculating NRDs, at which point NJDEP intends to vigorously pursue NRD claims.

While the scope and precise form of New Jersey's NRD enforcement initiative is yet to be seen, it is certain that NRDs will be a factor in New Jersey for the foreseeable future and that the regulated community and practitioners should certainly be considering potential NRD impacts in their transactions and site remediation efforts.

Environmental Justice to Take on Increased Importance in New Jersey

Bruce S. Katcher, Esq.

Beginning with an Executive Order signed by the Governor on April 20, 2018, the Murphy Administration signaled its intent to make Environmental Justice a centerpiece of the new Administration's environmental policy. That Order directed the NJDEP to "take the lead in developing guidance for all executive agencies for the consideration of Environmental Justice in implementing their statutory and regulatory responsibilities." The draft guidance was supposed to be completed within six months and the final guidance within ninety days thereafter.

While the completion of the draft guidance has been delayed, it is expected to see the light of day in early 2019 with final guidance to follow shortly thereafter. That delay has not impeded the Administration's efforts to pursue Environmental Justice aggressively, as evidenced by eight lawsuits announced by the Attorney General targeting environmental conditions in lower income and minority communities on December 7, 2018. The selected communities are in Camden, Flemington, Newark, Palmyra, Pennsauken, Phillipsburg, and Trenton.

These cases involve a variety of actions, including suits to recover natural resource damages, cleanup costs and civil penalties, actions to force responsible parties to clean up contaminated sites, and a case seeking the removal of illegally disposed of waste. The AG also announced the formation of a new Environmental Enforcement and Environmental Justice Unit and a nationwide leadership search for someone to head up the unit. Finally, he announced planned listening sessions with the Attorney General and the NJDEP Commissioner throughout the state in the coming months.

Thus, the coming year promises more aggressive environmental enforcement, particularly in Environmental Justice Communities as well as a new set of policy guidelines that will apply throughout the Murphy Administration.

New Jersey Stormwater Developments – New Utilities Legislation and Regs?

Bruce S. Katcher, Esq.

In June 2018, a bill passed the New Jersey Senate (S-1073) that would authorize municipalities, counties and certain municipal or county authorities to establish stormwater utilities with related fees and other charges to recover the utility's costs for stormwater management. The fees would be collected from the owner or occupant of any property from which stormwater runoff originates and enters the stormwater management system. Credits against the fees would be available for any property which has installed and maintains stormwater best management practices that reduce, retain or treat stormwater onsite or property

that installs, operates and maintains green infrastructure onsite. Contracts with private entities to plan, design, construct, operate and maintain the stormwater systems are authorized.

The companion bill, A-2694, was reported from the Assembly Telecommunications Committee in October 2018 and sent to the Assembly Appropriations Committee.

Business organizations have attacked the bills on the grounds that they will impose new taxes on industry which will be duplicative of existing permit requirements that impose costs of building and maintaining stormwater management equipment on the permittees.

Bills seeking to authorize the establishment of stormwater utilities have been introduced in several past legislative sessions without advancing to enactment. Whether this bill will yet see the light of day remains to be seen, however it seems to stand at least an even chance of passing the Assembly and being enacted into law in 2019.

Along a parallel track, NJDEP proposed changes to its stormwater regulations on December 3. The change that has attracted the most attention is the proposal to require new major developments to incorporate green infrastructure "to the maximum extent practicable" in order to meet groundwater recharge standards, stormwater runoff quantity standards, and stormwater runoff quality standards. This would replace the current requirement to incorporate nonstructural stormwater management strategies to meet these standards. Environmental groups have criticized the proposal for not addressing stormwater at existing developments, while developers have expressed hope for the increased flexibility that green infrastructure options may afford. Written comments on the proposal are due by February 1 and a final rule is expected before the end of the year.

DELAWARE FORECAST

DNREC to Promulgate Revised Coastal Zone Act Regulations in 2019

Stephen D. Daly, Esq.

In 2017, the Coastal Zone Conversion Permit Act (Conversion Permit Act) was signed into law, amending Delaware's landmark Coastal Zone Act. The amendments established a new "Conversion permit," distinct from the Act's Coastal Zone permit, that allows for the "conversion" of a heavy industry use within the Coastal Zone into an alternative heavy industry use, an additional heavy industry use, or a bulk product transfer facility, subject to certain permitting requirements.

The Conversion Permit Act sets October 1, 2019 as the deadline for when Delaware's Department of Natural Resources and Environmental Control (DNREC) must promulgate revised regulations consistent with the new amendments. DNREC is currently in the process of revising its existing regulations governing Delaware's Coastal Zone to incorporate conversion permits, although DNREC has represented that only those sections of the regulations pertinent to conversion permits will be amended. As part of this process, DNREC Secretary Shawn Garvin established a Regulatory Advisory Committee to provide them guidance and feedback on the development of new Coastal Zone regulations. It is estimated that the Regulatory Advisory Committee will issue its final recommendations to DNREC this spring. DNREC will then promulgate initial proposed regulations, which will be subject to a written public comment period. The

proposed regulations will also have to be approved by the Coastal Zone Industrial Control Board after a hearing.

The revised regulations will be an issue for any stakeholder in Delaware's Coastal Zone to monitor in 2019.

Climate Change and Brownfield Redevelopment Remain Focuses of Carney Administration

Stephen D. Daly, Esq.

As Governor Carney enters the third year of his administration, his agenda will likely continue to touch upon issues relating to energy and the environment in Delaware. Climate change and brownfield redevelopment remain two important areas of focus for his administration:

Climate Change

- Governor Carney has identified climate change as a threat to Delaware's future because of the state's status as the country's lowest-lying state. While the federal government has assumed a more limited role in curtailing climate change, Delaware continues to engage in initiatives to reduce carbon emissions and mitigate the effects of climate change. In 2017, Delaware joined the U.S. Climate Alliance, a coalition of states committed to upholding the Paris Agreement, in order to uphold the goals of the Paris Agreement to combat climate change.
- To uphold the goals of the Paris Agreement, the state continues to participate in the Regional Greenhouse Gas Initiative, a nine-state program to reduce greenhouse gas emissions from power plants, and also invests in and evaluates renewable energy sources. In June 2018, the Offshore Wind Power Working Group, a task force established by Governor Carney, submitted its final report to Governor Carney with an evaluation of Delaware's potential options for investing in an off-shore wind project. It remains to be seen whether the Governor will act on the Working Group's analysis and recommendations.
- Delaware also continues to invest in coastal resilience measures to mitigate the effects of climate change. DNREC's Shoreline and Waterway Management Section has been active in beach replenishment work along the state's coast line.

Brownfield Redevelopment

- The 2017 amendments to the Coastal Zone Act were largely directed at promoting redevelopment of brownfield sites located within Delaware's Coastal Zone. With the regulations addressing the Coastal Zone Act amendments due this year, the Carney administration is hoping the state's new Coastal Zone Act conversion permits will provide a viable avenue for redevelopment of the 14 heavy industry sites located within the Coastal Zone.
- Brownfield sites that the Carney administration has previously identified as candidates for redevelopment include the former Chemours site at Edgemoor, the former steel plant in Claymont, the General Motors auto plant in Newport, and the Seaford nylon plant. It is likely that the Carney Administration will continue to encourage redevelopment of these and other sites in the state in 2019.

New Stormwater Regulations Set to Take Effect in Delaware

Stephen D. Daly, Esq.

In October 2018, DNREC provided public notice of proposed revisions to its stormwater regulations that are intended to cure the defects identified by the Superior Court in *Baker v. DNREC, C.A. No. S13C-08-026 (Del. Super. Ct. 2015).* DNREC's 2013 stormwater regulations were intended to improve Delaware's stormwater and sediment plan review process and update the regulations to reflect current best management practices and referenced technical documents to support and explain the regulations. The *Baker* court struck down the 2013 regulations as invalid because the technical documents, which DNREC claimed were not subject to the state's Administrative Procedures Act (APA), improperly imposed mandatory obligations and standards on the regulated community. The court held that DNREC could not rely on technical and advisory documents that had not been formally adopted as regulations under the APA when reviewing sediment and stormwater plans and issuing permits.

With the October 2018 regulations, DNREC drafted the proposed revisions so that any mandatory requirements are included in the regulations, not the technical documents. DNREC further specified that the technical documents cannot be used for purposes of enforcement or to deny approval of a sediment and stormwater plan, although DNREC expects that the technical documents will still be used in the preparation of plans and for purposes of facilitating compliance with the regulations.

Once finalized, the revised regulations will likely take effect this year.