

2019 Environmental and Energy Law Forecast

PENNSYLVANIA FORECAST

Applying the Environmental Rights Amendment in 2019

Thomas M. Duncan, Esq.

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

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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 CO₂ equivalent (CO₂e). 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 CO₂ 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

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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

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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

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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.

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