MANKO | GOLD | KATCHER | FOX LLP

AN ENVIRONMENTAL AND ENERGY LAW PRACTICE

2021 Environmental and Energy Law Forecast

PENNSYLVANIA

Pennsylvania's Climate Change Initiatives Entering 2021

Thomas M. Duncan, Esq.

In 2020, Pennsylvania advanced a number of significant regulatory and executive actions that will potentially take effect in 2021. Some of these actions focus on greenhouse gases (GHGs) generally, while some focus more specifically on particular GHGs, such as CO_2 or methane.

Regional Greenhouse Gas Initiative

On November 7, 2020, the Environmental Quality Board (EQB) opened a public comment period on its proposed rulemaking entitled "CO_2 Budget Trading Program," which would establish Pennsylvania as the newest member of the Regional Greenhouse Gas Initiative (RGGI). A link to the proposed rulemaking is included here. As of the date of this writing, the comment period for the proposed rulemaking is set to close on January 14, 2021.

RGGI is an intergovernmental organization consisting of ten member-states (CT, DE, ME, MD, MA, NH, NJ, NY, RI, VT) that has established a market-based cap-and-trade program for CO_2 emissions from fossil fuel-fired power plants that have 25 megawatts or more of nameplate capacity and send at least 10 percent of their gross generation to the grid. In October 2019, Governor Tom Wolf signed Executive Order No. 2019-07 which directed the Pennsylvania Department of Environmental Protection (PADEP) to develop and present to the EQB a proposed rulemaking that would enable Pennsylvania to join RGGI.

The proposed rulemaking would aim to reduce CO_2 emissions from RGGI sources by 25.5 percent between 2022 and 2030. PADEP expects the auctions of RGGI credits to yield annual revenues of between approximately $179 million and $320 million through 2030. The Air Pollution Control Act requires that all auction proceeds be directed to the Clean Air Fund "for the use in the elimination of air pollution." PADEP has not yet developed a reinvestment plan for the auction revenues but currently intends for potential areas of reinvestment to include energy efficiency, renewable energy, and greenhouse gas abatement.

Based on an analysis conducted by a consultant retained by PADEP, most emission reductions are expected to come from reductions in coal use, while a smaller percentage would come from natural gas. While Pennsylvania would expect to see a total statewide emissions reduction of 183 million tons of CO_2 by 2030, approximately 96 million of that 183 million tons of CO_2 emissions would be shifted (i.e., leaked) to other states within PJM territory. PJM is a regional transmission organization that coordinates the movement of electricity in Pennsylvania, all or parts of twelve other states, and the District of

Columbia. In fact, nearly all of the anticipated reductions in natural gas emissions and generation in Pennsylvania are expected to be leaked to other PJM states. Largely for these reasons, both the PADEP Air Quality Technical Advisory Committee and the PADEP Citizens Advisory Council failed to pass a vote to concur in the proposed rulemaking, by votes of 9-9-1 and 4-9-1, respectively.

In addition, on November 17, 2020, PADEP informed the EQB that in the first quarter of 2021 PADEP intends to present a report that analyzes the costs and benefits of a rulemaking petition that was submitted by a group of individuals and organizations in 2018 that asked the EQB to establish a cap-and-trade program that would encompass a much broader set of sources than RGGI. For a more detailed explanation of this pending rulemaking petition, please refer to our prior article here.

Methane Emission Standards
On May 23, 2020, the EQB initiated a public comment period on a proposed rulemaking to reduce methane emissions by setting volatile organic compound emissions standards for existing oil and gas operations. A link to the preamble is included here. The comment period closed on July 27, 2020, and PADEP is in the process of drafting a final regulation.

Mobile Sources
On December 21, 2020, a group of four northeastern states, including MA, CT, RI, and the District of Columbia, formed the Transportation and Climate Initiative (TCI) by signing on to a Memorandum of Understanding (MOU) with a goal of creating a cap-and-invest program to reduce CO_2 emissions from the transportation sector. The program would specifically target fuel suppliers. Pennsylvania and seven other states have opted not to sign on to the MOU at this time and instead intend to continue to work with the TCI states to develop the details of the program while pursuing their own state-specific initiatives. TCI expects to issue a model rule in 2021.

Relatedly, PADEP is developing a proposed rulemaking that would amend PADEP's Clean Vehicles Program at 25 Pa. Code Chapter 126, Subchapter D, by establishing a requirement for automakers to offer for sale a percentage of Zero Emission Vehicle Program-eligible light duty vehicles as part of their model offerings.

Hydrofluorocarbons
Finally, PADEP has announced that it is developing a proposed rulemaking that would amend 25 Pa. Code Chapters 121, 129, and 130 to impose additional requirements for the control of hydrofluorocarbons (HFCs) by preventing the future use of HFCs in sources such as air conditioning and refrigeration. No date has been announced for the proposed rule.

PADEP New Management of Fill Policy Forecast of Impacts

Michael M. Meloy, Esq. and William Hitchcock, Technical Consultant

The proposed changes to the cleanup standards under the Pennsylvania Land Recycling and Environmental Remediation Standards Act (Act 2) described elsewhere in this forecast will also have a significant impact on construction projects requiring the import or export of fill material even if those projects are outside the scope of Act 2. On January 1, 2020, a new version of PADEP's Management of Fill Policy went into effect and generally incorporated the Act 2 residential soil standards as clean fill concentration

limits by reference. Therefore, revisions to the Act 2 cleanup standards will also result in immediate revisions of the clean fill concentration limits. The proposed new standard for total PCBs and the increased standard for benzo[a]pyrene should allow for more material to qualify as clean fill, which should be generally beneficial to the construction industry. However, the anticipated significant decrease in residential cleanup standards for lead and the continued use of a residential cleanup standard for vanadium that is below naturally-occurring soil concentrations will have the opposite effect. The proposed changes to the Act 2 cleanup standards are not yet finalized but are expected to go into effect in mid-2021.

Significant Changes Coming to Act 2 Cleanup Standards

Michael M. Meloy, Esq. and William Hitchcock, Technical Consultant

Throughout 2020, PADEP and the Cleanup Standards Scientific Advisory Board (CSSAB) have been working through issues regarding changes to the regulations implementing the Pennsylvania Land Recycling and Environmental Remediation Standards Act (Act 2). Those changes were proposed for public comment on February 15, 2020 and included extensive modifications to cleanup standards to be used under Act 2. Significant changes to the cleanup standards include the addition of standards for certain perfluoroalkyl substances (PFAS) as well as a standard for total polychlorinated biphenyls (PCBs) in addition to the aroclor-specific values. The soil cleanup standards for benzo[a]pyrene, a ubiquitous contaminant that is commonly encountered in populous areas of Pennsylvania, is proposed to increase substantially. Two of the most significant issues with the rulemaking, however, are the proposed changes to the soil cleanup standards for lead and PADEP's failure to correct the vanadium cleanup standards that were revised in 2016.

In the proposed regulations, PADEP included soil cleanup values for lead by using complex dose-response models developed by EPA in conjunction with a target blood lead level (TBLL) of 10 µg/dL. As proposed, these models generated direct contact numeric standards for lead that are slightly lower than existing values for residential properties but substantially higher for nonresidential properties. Based on public comments that it received, PADEP is now considering lowering the TBLL to 5 µg/dL even though that change was not included in the proposed regulations. Although the CDC has recommended the use of the lower TBLL since 2012, EPA has continued to use a value of 10 µg/dL and the regulations implementing Act 2 do not allow PADEP to use more stringent exposure factors than EPA. The effect of changing the TBLL to 5 µg/dL will be to lower the cleanup standard for lead in soils at residential properties to approximately one-third of its current value while leaving the direct contact numeric standard for lead in soils at nonresidential properties approximately where it is currently. The changes that PADEP is contemplating are further complicated by the fact that the models that PADEP is relying upon utilize average concentration values as inputs but thus far, PADEP has not made necessary corollary changes in the attainment requirements to reflect this fact.

The cleanup standards for vanadium were significantly reduced during the last round of revisions to the cleanup standards in 2016. The current residential soil cleanup standards are far below naturally-occurring concentrations of vanadium in soils throughout Pennsylvania, and as such, have created significant but artificial hurdles for Act 2 soil remediation projects, as well as projects governed by the Management of Fill Policy. The CSSAB has raised concerns since 2018 with the approach that PADEP has taken. At the request of PADEP, the CSSAB has provided several scientifically supported recommendations that are in use by EPA and other states to rectify the problems that were created in 2016 while still being protective of

human health and the environment. However, PADEP has thus far refused to implement any of these recommendations based largely on procedural grounds. It appears that PADEP may require that changes to cleanup standards for vanadium be addressed in a separate rulemaking even though there were in fact modifications to certain of the numeric standards for vanadium proposed in the pending regulations.

Based on the most recent discussions with PADEP, it appears that PADEP plans to finalize the amendments to the regulations in time for submission to the Environmental Quality Board in April 2021. If the regulations are approved, they would likely take effect sometime in the summer of 2021. Through our continued involvement with the CSSAB, we will continue to track these proposed changes until they are finalized and go into effect later in 2021.

PFAS Remain a Pennsylvania Focus

Austin W. Manning, Esq.

Governor Wolf's PFAS Action Team's efforts stalled a bit this past year. The Phase 1 results of the PFAS Sampling Plan were originally expected to be released periodically throughout 2020, however, no results have been provided since October of 2019. Further, Pennsylvania DEP has not progressed on establishing a maximum contaminant level for PFAS nor does it plan to deviate from the federally established health advisory levels.

That is not to say that the State of Pennsylvania has lost focus on PFAS. Approximately four million dollars were allocated in the omnibus spending bill passed by the Pennsylvania Legislature in late 2020 for infrastructure projects that address PFAS contamination in drinking water in certain townships. The PFAS National Multi-site Health Studies, which studies the health effects of PFAS in select locations including Montgomery and Bucks counties, continues as well. It is anticipated that the Pennsylvania Department of Health will begin to collect blood samples for the study in residents in 2021. Pennsylvania DEP's efforts to finalize the addition of medium-specific concentrations for PFOA, PFOS, and PFBS are also progressing as expected. Currently, the proposed rulemaking is not expected to be finalized until April at the earliest.

Public Comment Period Opens on Amendments to PADEP's Wetland Permitting Program

Zachary J. Koslap, Esq.

On December 5, 2020, the Pennsylvania Environmental Quality Board (EQB) published a proposed rulemaking to amend the Pennsylvania Department of Environmental Protection's (PADEP) Chapter 105 regulations, which are known as the state's wetland permitting regulations and implement the Dam Safety and Encroachments Act. The proposed amendments amount to the first substantive revisions to the Chapter 105 regulations in nearly 30 years. The public comment period closes on February 3, 2021.

Many of the proposed amendments to Chapter 105 would formalize existing permit application requirements already found in PADEP's guidance or permit application forms. Other proposed changes, however, would expand or make more stringent existing permit application requirements. For example, applicants would be required to consider "reasonably foreseeable future development" within the watershed as part of the alternatives analysis used to demonstrate that impacts to wetlands and aquatic resources are avoided and minimized to the "maximum practicable extent." And where impacts cannot be avoided, a

compensatory mitigation plan must ensure that "no net loss" of "wetland resources" occurs as part of the proposed project, providing a regulatory basis that more wetland replacement acreage may be required beyond the existing 1:1 ratio of wetland replacement.

The following are among the other proposed changes to Chapter 105:

- New waivers to permitting requirements, including waivers for geotechnical or environmental site investigations, recreational trails, and temporary pads at wetland crossings.

- New restrictions on waivers to permitting requirements, including prohibiting the use of waivers for stream enclosures located in a drainage area less than 100 acres, in areas that are habitat for threatened or endangered species, or in historically significant areas that are recognized nationally, statewide, or even locally.

- New construction, operation, and maintenance requirements relating to dams.

- Clarification on PADEP's policy relating to prior converted croplands.

Applying the Environmental Rights Amendment in 2021

Thomas M. Duncan, Esq.

Courts in 2020 continued to define the contours of Article I, Section 27 of the Pennsylvania Constitution, known as the Environmental Rights Amendment (ERA). The ERA, 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.

Statutory Authority

In 2017, as reported here, the Pennsylvania Supreme Court, in *Pa. Envtl. Defense Found. v. Commonwealth*, 161 A.3d 911 (Pa. 2017) ("*PEDF II*"), overturned a decades old balancing test and instead focused on the text of the ERA, splitting it into two parts – the individual right embodied in the first sentence, and the Commonwealth's trustee obligations embodied in the second and third sentences. The Supreme Court applied the second and third sentences of the ERA in the context of private trust principles that existed at the time the ERA was enacted in 1971 and struck down as unconstitutional statutory enactments that directed oil and gas royalties to the Commonwealth's general fund rather than a fund used exclusively for conservation purposes. The Supreme Court found that "royalties – monthly payments based on the gross production of oil and gas at each well – are unequivocally proceeds from the sale of oil and gas resources" and must therefore remain in the trust. The Supreme Court remanded to the Commonwealth Court the issue of whether rental payments and up-front bonuses made under those oil and gas leases constituted trust assets that must also be used exclusively for conservation purposes.

In 2019, as reported here, the Commonwealth Court, in *Pa. Envtl. Defense Found. v. Commonwealth*, 214 A.3d 748 (Pa. Cmwlth. 2019) ("*PEDF III*"), held that two-thirds of rental payments and up-front bonuses must be reserved for conservation purposes under the ERA. The Court held, however, that proceeds designated as income are not required to remain in the corpus of the trust and used solely for conservation purposes and may instead be appropriated for general fund purposes. The Court therefore found that the statutory enactments that directed the transfer of the rental and bonus payments to the Commonwealth's general fund were not facially unconstitutional, but the Court noted that an accounting is necessary to ensure that no more than one-third of the rental and bonus payments were used for non-conservation purposes. PEDF has appealed that decision to the Pennsylvania Supreme Court.

On October 22, 2020, as reported here, the Commonwealth Court rejected a facial constitutional challenge to two statutory enactments that directed over $110 million generated from oil and gas leases on state lands to pay for the general government operations of the Pennsylvania Department of Conservation and Natural Resources, finding that the appropriations were not facially unconstitutional under the ERA. *Pa. Envtl. Defense Found. v. Commonwealth*, 241 A.3d 119 (Pa. Cmwlth. 2020) ("*PEDF IV*"). In rejecting the facial constitutional challenge, the Court noted that the enactments did not identify whether the funds were royalties, rents, bonuses, or interest, and therefore the Court could not determine that the enactments were facially unconstitutional. The Court, however, similar to its holding in *PEDF III*, required the Commonwealth to conduct an accounting to ensure that the assets of the trust are being used for purposes authorized by the trust or necessary for the preservation of the trust in accordance with the ERA. The Court likewise rejected an argument that the use of the funds is restricted to the Marcellus Shale region, noting that the public trust under the ERA encompasses all public natural resources and not just one specific type. The Court also upheld the repeal of the 1955 Lease Fund Act, finding that the "Commonwealth has a *constitutional* obligation to ensure that trust proceeds are used to conserve and maintain the corpus of the trust, regardless of any *statutory* safeguards." PEDF has appealed that decision to the Pennsylvania Supreme Court.

Regulatory Authority

On February 21, 2020, as reported here, the Commonwealth Court dismissed a claim brought by a group of municipalities alleging that a Pennsylvania Public Utility Commission (PUC) regulation governing the siting of gas meters failed to sufficiently protect historic resources under the ERA. *See City of Lancaster, et al. v. Pa. Pub. Util. Comm'n*, No. 251 MD 2019 (Pa. Cmwlth. Feb. 21, 2020) (unreported). The PUC regulation at issue, 52 Pa. Code § 59.18, was amended in 2014 to encourage natural gas distribution companies (NGDCs) to site gas meters outside, rather than inside, of buildings. Subsection 59.18(d), nevertheless, allows an NGDC to consider locating a gas meter inside of a historic building, such as one designated as historic under the Pennsylvania Historic District Act, but only if certain safety conditions are met.

In *City of Lancaster*, an NGDC serving three municipalities – the City of Lancaster, Borough of Carlisle, and Borough of Columbia – had decided to relocate meters from the interior of buildings to the exterior of buildings in the municipalities' historic districts. The municipalities argued that Section 59.18 violates the ERA by making the interior locations of meters in historic districts the exception rather than the rule, by failing to set standards that a utility must follow when installing a meter in a historic district to protect historic

resources, by leaving this decision to the ultimate discretion of the utility, and by exempting utilities from local historic district requirements.

The Court began its analysis by noting that the Pennsylvania Supreme Court, in *PPL Electric Utilities Corp. v. City of Lancaster*, 214 A.3d 639 (Pa. 2019), held that the Pennsylvania Public Utility Code occupies the entire area of utility regulation in the Commonwealth, known as "field preemption." The Court stated that, as a general matter, Section 59.18 therefore supersedes any local regulation or ordinance that falls within the ambit of that field. At the same time, as the Commonwealth Court previously held in *UGI Utilities, Inc. v. City of Reading*, 179 A.3d 624 (Pa. Cmwlth, 2017), preemption is barred where the regulation at issue completely removes protections to the public natural resources protected by the ERA.

Here, the Court found that the municipalities failed to establish that 52 Pa. Code § 59.18, on its face, caused an "unreasonable degradation" of historic values protected under the ERA. The Court explained that the intent of Section 59.18 is actually to protect historic buildings by providing a specific exception for considering the placement of meters indoors in historic districts as long as certain safety requirements are met. The Court emphasized that "the duties to conserve and maintain natural resources under the ERA 'do not require a freeze of the existing public natural resource stock" and "are tempered by legitimate state interests.'" The Court ultimately dismissed the municipalities' facial challenge to Section 59.18, finding that there may be circumstances in which no harm to historic resources will result from the placement of meters outside of historic buildings, but allowed the municipalities to seek to amend their Petition for Review to assert an as-applied challenge.

City of Lancaster is a reminder that courts will require parties to allege specific facts to support their ERA claims and that courts will tend to defer to the Commonwealth in the face of an ERA challenge when there is a sufficient state interest in the regulation at issue.

Local Authority

On March 2, 2020, as reported here, the Pennsylvania Commonwealth Court ruled that a municipality was allowed to proceed with challenging the validity of certain environmental state statutes under the ERA. *Pa. Dept. of Envtl. Prot. v. Grant Twp.*, No. 126 M.D. 2017 (Pa. Cmwlth. Mar. 2, 2020) (unreported). The issue of whether and if so the extent to which the validity of Pennsylvania's environmental statutes can be challenged under the ERA had previously been left open by the Pennsylvania Supreme Court in *PEDF II*.

In 2014, Grant Township attempted to pass an ordinance prohibiting the disposal of waste from oil and gas extraction within the Township. In 2015, however, a federal court struck down the ordinance as a violation of the Second Class Township Code and as being unlawfully exclusionary. In response, the Township adopted a Home Rule Charter which prohibited oil and gas waste fluid injection wells and precluded the application of any state laws pertaining to the disposal of waste from oil and gas extraction where those state laws conflict with the Home Rule Charter. In 2017, PADEP issued a well permit which allowed Pennsylvania General Energy Co., LLC (PGE) to convert an existing natural gas well into an underground injection well for the disposal of brine and other oil and gas wastes. At the same time, PADEP filed a Petition for Review before the Commonwealth Court seeking declaratory relief that state laws such as the Oil and Gas Act and the Solid Waste Management Act preempt the Home Rule Charter's prohibition on oil

and gas waste fluid injection wells. In its counterclaims, the Township argued that: (1) the Home Rule Charter provisions were enacted pursuant to the ERA and therefore were a valid exercise of the Township's constitutional rights which cannot be preempted by state statute, and (2) PADEP has violated its duties as a public trustee under the ERA and violated the ERA by attempting to prevent the people of the Township from protecting their rights under the ERA. The Commonwealth Court, in *Grant Township*, denied PADEP's Application for Summary Relief that sought to dismiss the Township's counterclaims, setting the stage for the parties to put on evidence before the Commonwealth Court in its original jurisdiction.

On March 19, 2020, in response to the Commonwealth Court's decision, PADEP issued a letter rescinding the well permit that it had previously issued to PGE, claiming that the activities authorized by the well permit would violate Grant Township's Home Rule Charter unless and until the applicable provision of the Home Rule Charter is modified or otherwise found to be legally invalid. PGE subsequently appealed the rescission of the well permit to the Pennsylvania Environmental Hearing Board. That appeal has been stayed until March 31, 2021. In addition, on December 2, 2020, PGE filed a lawsuit against Grant Township in federal court aimed at overturning the Home Rule Charter.

* * *

Looking into 2021, there may be a relatively decreasing trend in ERA case law but expect parties to raise important issues that are currently undecided, such as the definitions of the terms "Commonwealth" and "public natural resources" in the ERA and the extent to which the ERA imposes independent obligations on PADEP and other state agencies.

Pennsylvania's Reasonably Available Control Technology (RACT) III Rule Expected in 2021

Katherine L. Vaccaro, Esq. and Michael C. Nines, P.E., LEED AP, Technical Consultant

More than two decades ago, Pennsylvania established Reasonably Available Control Technology standards, applicable to facilities whose emissions of Oxides of Nitrogen (NOx) and Volatile Organic Compounds (VOC) exceed major source thresholds, as a way to demonstrate compliance with the federal National Ambient Air Quality Standards (NAAQS) for ozone. As the name implies, RACT standards are technology based, intended to drive the application of reasonably available air pollution control technology to achieve emission reductions from existing sources. But unlike similar technology-based standards at the federal level, the notion of "reasonable availability" does take into account both technological and economic feasibility.

The Clean Air Act (CAA) requires EPA to revaluate the NAAQS every five years to ensure that the standards in effect remain sufficiently protective of human health and the environment. In this context, EPA has strengthened the NAAQS for ozone several times over the years. In response, PADEP has implemented more stringent RACT standards, most recently in 2019 with the promulgation of what is commonly called "RACT II." Incidentally, following a Sierra Club challenge to RACT II, the Third Circuit Court of Appeals vacated in August 2020 certain elements of RACT II relating to the use of selective catalytic reduction to control NOx emissions. *Sierra Club v. EPA,* No. 19-2562 (3d. Cir. 2019). PADEP is in the process of reconsidering the RACT II standards, but at present, it is unclear whether DEP will try to

save the existing standards by developing supplemental supporting information, or whether it will establish new, more stringent emission limits. As directed by the Court, Pennsylvania's state plan implementing RACT II must be approved by EPA by 2022, and if not, EPA will need to issue its own Federal Implementation Plan.

While these RACT II issues continue to unfold, PADEP is separately poised to propose the third iteration of the state's RACT standards (RACT III) this year, this time in response to EPA's 2015 ozone NAAQS. PADEP started working on the new RACT III standards in late 2019 in conjunction with Pennsylvania's Air Quality Technical Advisory Committee (AQTAC) and the Citizens Advisory Council (CAC), although the rulemaking is still in its nascent stages. Thus far, PADEP is considering establishing presumptive emission limits on certain sources subject to RACT III that were in existence before August 3, 2018. In addition, the proposed rule would establish a "case-by-case" control evaluation requirement for certain sources. For facilities subject to the RACT III rule, detailed notification requirements are being considered such that affected facilities would need to demonstrate how they plan to comply with the requirements, even if the sources are subject to presumptive RACT. If finalized, these notifications would be required no more than six months after a final rulemaking is published. PADEP is also considering allowing case-by-case determinations made under RACT II to satisfy the case-by-case requirements of RACT III, except in circumstances where presumptive requirements of RACT III are more stringent. And further, it is unclear how PADEP's current reconsideration of the RACT II standards in response to the Third Circuit's decision could bear upon this proposed approach.

For specific types of emission sources, the RACT III proposal would seek to control fugitive sources of VOCs at oil and gas facilities by aggregating with an associated stationary source to determine the boundaries of the source with regard to the 1.0-ton and 2.7-ton applicability thresholds. This could be meaningful for the oil and gas industry, as relatively minor equipment changes, such as adding new piping and related components, have historically been exempt from Plan Approval when evaluated on a project-specific basis. Combustion units (i.e., boilers) rated between 20 and 50 MMBtu/hour heat input would have enhanced tune-up requirements consistent with the Maximum Achievable Control Technology (MACT) rule for boilers. For larger combustion units, PADEP is considering a presumptive NOx RACT requirement of 0.10 lb/MMBtu for propane and liquid petroleum gas-fired combustion units rated at 50 MMBtu/hour or greater. And for simple cycle turbines rated between 1,000 and 3,000 brake horsepower and firing natural gas, PADEP is considering lowering the NOx limit to 85 ppmdv @ 15 percent oxygen, down from 150 ppmdv in RACT II. Several other source-specific RACT limitations are being considered in the rule, including direct-fired ovens/furnaces, internal combustion engines, and cement kilns, among others.

Between the court mandated RACT II reconsideration process and the RACT III rulemaking development, PADEP appears to have its hands full at least on the RACT front. Yet, PADEP is still reporting that it expects to deliver a proposed RACT III rule to the Environmental Quality Board (EQB) during the first quarter of 2021. If authorized by the EQB, a proposed rule could be published in the Pennsylvania Bulletin as early as the second quarter of 2021, thereby triggering the requirement to allow for public comment.

Philadelphia Building Energy Performance Tune-Up Time

Brenda H. Gotanda, Esq.

This year Philadelphia takes its next step toward improving energy efficiency and reducing the carbon footprint of large commercial buildings in the city through implementation and initial deadlines under the Building Energy Performance Policy (the Policy), also known as the Building Tune-Up Program. The Policy, passed by City Council a little over a year ago, creates a program that requires owners of large non-residential buildings to conduct a "tune-up" of their building's energy and water systems and to certify building performance to the City of Philadelphia Office of Sustainability (OOS). Regulations were issued by the OOS in October 2020 to provide clarifying information on program implementation, exemptions, and deadlines. Philadelphia projects that the Policy will result in a reduction of carbon pollution in the city of nearly 200,000 metric tons and will help to achieve Mayor Kenney's goal of reducing carbon emissions 25 percent by 2025.

The Policy applies to all non-residential buildings with an indoor floor space of at least 50,000 square feet. This includes mixed-use buildings with areas of non-residential use greater than the threshold, industrial and manufacturing facilities, and buildings used for temporary lodging such as hotels, motels, and short-term rentals. However, it does not include residence halls, dormitories and other non-transient large lodging places or parking lots and garages.

Owners of covered buildings must perform a "tune-up" on their base building systems that use energy or impact energy consumption (e.g., building envelope, HVAC, electrical lighting, conveying, and domestic hot water systems). The required tune-up consists of two components, an inspection supervised by an approved Qualified Tune-Up Specialist and corrective actions to increase energy efficiency. The Specialist must prepare a Tune-Up Report containing findings and recommendations regarding each of the required inspection elements and the report must be submitted to OOS by the Policy deadlines, which are based upon building size.

The first compliance deadline under the Policy is September 30, 2021 and applies to the largest buildings, namely those that are 200,000 square feet or larger. In light of COVID-19, however, the regulations provide that this first tune-up compliance deadline may be extended to March 30, 2022 for building owners who submit a request for deadline extension to OOS by April 5, 2021. The next tune-up compliance deadline is September 30, 2022 and is applicable to buildings between 100,000 and 200,000 square feet in size. Tune-up deadlines for smaller buildings (those from 70,000 to 100,000 sq. ft and from 50,000 to 70,000 sq. ft) will occur in 2023 and 2024, respectively. Large portfolio owners may apply to OOS for an alternative compliance schedule.

The Policy provides a number of exemptions to the tune-up requirement. These include, among others, exemptions for certain high-performing buildings that have met the requirements of the City's building Benchmarking Policy for the prior two years and satisfy other applicable criteria. For example, buildings that have achieved an ENERGY STAR Score of at least 75 or achieved LEED Gold O&M v.4 or Net-Zero Energy Certification or better may qualify. Likewise, buildings may also qualify if they achieve certain levels of energy savings, have completed a retro-commissioning program or implemented certain measures following an energy audit. Specific criteria and timeframes for achieving the exemption criteria are set forth in the Policy. Building owners may request an extension of time to meet compliance deadlines applicable to exemptions, however, requests must be submitted in accordance with the specified timeframes.

Large building owners in Philadelphia covered by the Policy should familiarize themselves with the applicable requirements, exemptions, and deadlines and begin to chart a path toward achieving their selected compliance option.

Pennsylvania Enacts Controversial Bill Promoting Advanced Plastics Recycling

Rodd W. Bender, Esq.

Today certain types of plastics, including those used in water bottles and milk jugs, are easily recycled. Other ubiquitous plastic items, such as detergent bottles, shopping bags, and egg cartons, pose a bigger sustainability challenge because they cannot be recycled in the same way. To address this problem, Pennsylvania recently enacted legislation to promote advanced recycling of hard-to-recycle plastics. This action, intended to reduce regulatory burdens on advanced plastics recycling facilities, may help divert these plastics from landfills and oceans while creating jobs at new recycling plants in the Commonwealth. Critics in the environmental community, however, question whether the sustainability and economic benefits of increased plastics recycling may be outweighed by environmental harms, chief among them climate change impacts from converting plastics into fossil fuels.

Governor Wolf signed a bill on November 25, 2020, amending the Pennsylvania Solid Waste Management Act (SWMA) to exclude post-use polymers converted using advanced recycling technologies from regulation as solid, municipal, or residual waste. Act 127 further provides that advanced recycling of post-use polymers does not constitute waste processing or treatment. The upshot of these changes is to exempt advanced plastics recycling facilities from the lengthy and expensive process of obtaining SWMA processing or treatment permits.

As always, the devil is in the details. The Act defines “post-use polymers” as post-use plastic from residential, municipal or commercial sources that would not otherwise be recycled, but excludes plastics mixed with other waste except for minor impurities like paper labels or metal rings. To satisfy the exemption, “advanced recycling facilities” are defined as those that separate, store, and convert post-use polymers through pyrolysis, gasification, depolymerization, catalytic cracking, reforming, hydrogenation and similar technologies into basic hydrocarbon raw materials, feedstocks, chemicals, crude oil, liquid fuels, waxes, lubricants, and other products. The Act declares these activities to be manufacturing rather than waste management.

Given these definitions, facilities that receive and sort plastics and other wastes for recycling, but which do not perform an advanced recycling process, will not benefit from this permitting exemption. In addition, the Act requires compliance with all other environmental regulatory requirements (such as permitting of air or wastewater emissions) to be excluded from the obligation to obtain a SWMA processing or treatment permit.

Supporters of the Act say that facilitating local advanced plastics recycling infrastructure will help fill the void created by China’s 2018 ban on U.S. plastic waste imports, close the loop by converting hard-to-recycle plastics into new products, and create hundreds of recycling jobs. Conversely, several environmental groups opposed the bill, arguing that promoting technologies like pyrolysis and gasification will simply encourage burning of plastics and lead to increased air pollution and greenhouse gas emissions.

Those on both sides of the debate will watch carefully in 2021 and beyond to see whether the Act leads to proposals for new Pennsylvania advanced plastics recycling facilities, and whether these facilities are challenged by environmentalists and local communities on climate change, environmental justice, and other grounds.