

### 2021 Environmental and Energy Law Forecast

#### FEDERAL

##### Forecast of Federal Environmental Policy in 2021

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With President-elect Biden set to begin his term later this month, 2021 will mark a major shift in federal environmental policy, though the incoming administration will face its share of challenges as it looks to advance its new agenda. In its last year in office, the Trump administration enacted a flurry of rulemaking and executive action in an effort to lock in its environmental policy objectives beyond 2020, some of which were covered in detail in our 2020 forecast. For example, the Trump administration finalized significant changes to the National Environmental Policy Act (NEPA), enacted the Navigable Waters Protection Rule, and undertook important rulemaking efforts under the Clean Air Act. Though the Biden administration will be coming into office with different policy priorities, some of the Trump administration's recent rulemaking and policy efforts may make advancing its environmental agenda more difficult. To that end, this federal forecast provides an overview of the anticipated actions that an incoming Biden administration may take and more detailed coverage of the federal actions that will remain important in 2021.

President-elect Biden has made clear that climate change will be a major priority in the incoming administration's overall environmental policy objectives. Accordingly, Biden has announced his intention to reenter the Paris Climate Agreement on the first day of his presidency. The United States formally entered the Paris Agreement under the Obama administration on September 3, 2016 and committed to reduce greenhouse gas emissions by 26 percent to 28 percent from 2005 levels by 2025. After the Trump administration repealed and replaced the Obama-era Clean Power Plan, the United States gave notice of its intent to withdraw from the Paris Agreement on November 4, 2019, and the withdrawal formally took effect one year later on November 4, 2020. Although it is unclear whether the Biden administration will commit to the same greenhouse gas emissions reductions as originally proposed in 2016, Biden has made clear his priority to cooperate internationally on the reduction of greenhouse gas emissions.

The Biden transition team also has signaled a renewed emphasis on environmental justice. During his presidential campaign, Biden pledged to prioritize environmental justice initiatives across the federal government, including through the creation of an environmental and climate justice division within the U.S. Department of Justice (DOJ). Additionally, Biden has announced cabinet-level nominees to the Environmental Protection Agency, Department of Interior, and the Council on Environmental Quality (CEQ) that indicate the incoming administration's prioritization of addressing environmental justice concerns.

An early opportunity for the Biden administration to advance both climate change and environmental justice priorities may be through a rollback of the Trump administration's [recent overhaul](#) of NEPA's implementing

regulations. Earlier this year the Trump administration [finalized new regulations](#) revamping the environmental review process of major federal actions under NEPA, with the intention of reducing the time and resources required for a federal agency to complete a NEPA review. Among other changes, the new regulations eliminated the requirement to consider a project's cumulative impacts, a provision through which climate impacts were often considered. The Biden administration may attempt to strengthen requirements related to consideration of climate change and environmental justice impacts of major federal actions. Exactly how far the Biden administration will go to rollback the recent changes to the NEPA review process remains to be seen, however, as the transition team has signaled a competing priority of quickly advancing national infrastructure projects that could be required to move through the NEPA review process.

The Biden administration may also look to reverse the Trump administration's decision to end the use of supplemental environmental projects (SEPs) in settlement agreements as part of its focus on climate change and environmental justice initiatives. As noted in more detail in this federal forecast, the use of SEPs in settlement agreements have been favored by members of the regulated community, EPA, and community beneficiaries, and it is anticipated that the Biden administration may revive the use of SEPs, particularly as part of addressing environmental justice and climate justice concerns in certain overburdened communities.

The Biden administration is expected to target other recent rulemakings from the Trump administration for potential rollback, including, among other examples, the Affordable Clean Energy Rule, the SAFE Vehicles Rule, and rules modifying implementation of the Endangered Species Act. Procedurally, however, the Biden administration may have an easier time reversing President Trump's executive orders that touch upon the environmental sector. For example, Biden is expected to rescind [E.O. 13771](#) "Reducing Regulation and Controlling Regulatory Costs," which directs agencies to eliminate two rules for every rule added. Biden also may look to rescind [E.O. 13891](#) "Promoting the Rule of Law Through Improved Agency Guidance Documents," which directs federal agencies to develop regulations that set forth processes and procedures for issuing guidance documents. Among other requirements, the recently finalized rule implementing E.O. 13891 requires EPA to notify the public when it issues new guidance and will open public notice and comment opportunities for the issuance of what EPA determines to be significant guidance.

Other recent rules and guidance adopted by the Trump administration could continue to impact the regulatory community in 2021 and beyond. In 2020, for example, EPA finalized the Navigable Waters Protection Rule, which amended the scope of the waters of the United States (WOTUS) regulated under the Clean Water Act, following the Trump administration's repeal of the 2015 WOTUS rule. The Trump administration likewise took recent actions under the Clean Air Act, publishing final rules and guidance impacting New Source Review, Startup, Shutdown, and Malfunction, risk management planning, and other programs. EPA also issued additional rulemaking in connection with the Lautenberg Act amendments to the Toxic Substances Control Act; implemented its Unregulated Contaminant Monitoring Rule for the Fifth Monitoring Cycle (UCMR 5); and has taken additional steps to regulate certain PFAS and PFOA in drinking water and in other environmental media.

Additional items facing an uncertain future under the Biden administration include EPA's new draft guidance addressing the Supreme Court's recent decision in *County of Maui v. Hawaii Wildlife Fund* and EPA priorities under the Superfund program. EPA's *Maui* guidance places the Supreme Court's "functional equivalent" analysis into context within EPA's NPDES permit program. With the Court's holding in *Maui* still

fresh, the Biden administration may take a more expansive view of what it considers a functional equivalent of a direct discharge from a point source into navigable waters. Additionally, the Biden administration may implement different priorities under the Superfund program, under which the Trump administration had sought to promote efficiency in cleanups, including climate resiliency, environmental justice, and emerging contaminants.

## **AIR**

### **Changing Nature of Climate Change**

***Megan A. Elliott, Esq.***

United States policy towards climate change has undergone several shifts over the past decade. The Obama administration's sweeping reform of carbon-based emission standards, known as the Clean Power Plan (CPP), was undone via executive order by President Trump and was subsequently replaced by the Trump administration's Affordable Clean Energy (ACE) Rule. With the upcoming inauguration of President-elect Biden, it appears that the pendulum is set to swing again.

The Obama-era CPP sought to curb greenhouse gas (GHG) emissions by regulating existing coal-fired power plants, while simultaneously incentivizing energy production from lower GHG-emitting sources, including natural gas and renewable power generation. The CPP established a regulatory scheme predicated on statewide carbon budgets and approached the issue of climate change in a more holistic manner than previous attempts.

EPA under the Trump administration took the position that the CPP represented an impermissible overreach because EPA's authority to regulate facilities under Section 111 of the Clean Air Act was more limited in scope and did not permit the Agency to go "beyond the fenceline" of regulated facilities. In contrast to the CPP, the ACE Rule gives states primary authority to regulate GHGs from coal fired power plants by establishing unit-specific standards and does not require emissions reductions across the sector as a whole. There is currently litigation pending in the U.S. Court of Appeals for the D.C. Circuit regarding the ACE Rule, but it is expected that a Biden-led EPA will decline to defend the ACE Rule in that litigation and will ask the court to return the matter to the agency so that it can draft regulations more in line with the Biden administration's stated policies.

President-elect Biden has described climate change as the "existential threat of our time" and has announced plans to spearhead a "national effort aimed at creating the jobs we need to build a modern, sustainable infrastructure now and deliver an equitable clean energy future." The Biden EPA will likely learn from the legal challenges to the CPP and will pursue a more tailored version of the CPP that demands aggressive carbon emissions limits from existing coal-fired power plants, as opposed to a sector-wide approach.

Power sector carbon emissions likely won't be the only climate-related issue the Biden administration will address at the beginning of its term. The administration is also expected to address the Trump administration's rulemaking on New Source Performance Standards for methane emissions from the oil and gas sector; automobile emissions regulations; fuel efficiency standards; and the [environmental justice issues](#) implicated throughout. The Biden administration may also try to regulate high-emitting industry sectors like manufacturing for the first time.

The Biden transition team has also made several key personnel nominations impacting climate, including former Secretary of State John Kerry, who will serve as the “special presidential envoy on climate change,” and will be the first official dedicated to climate change to sit on the National Security Council. Biden has also nominated Congresswoman Deb Haaland as Secretary of the Interior, Michael Regan as EPA Administrator, Former Governor Jennifer Granholm as Secretary of Energy, and Brenda Mallory as Chair of the Council on Environmental Quality.

## **New Source Review: Issues to Watch**

***Carol F. McCabe, Esq.***

The Clean Air Act New Source Review (NSR) program is notoriously complex and has been subject to a long history of rulemakings, guidance, applicability determinations and court decisions that have affected the manner in which NSR applicability is determined. Intended to force pollution control upgrades when new major sources are built or existing major sources are modified, addressing NSR permitting requirements can be time-consuming and costly, including the Prevention of Significant Deterioration (PSD) program for NAAQS attainment areas (requiring ambient air quality analyses and the application of Best Available Control Technology) and the Non-Attainment New Source Review program for NAAQS nonattainment areas (requiring emissions offsets and the application of Lowest Achievable Emission Rate).

Over the course of the Trump administration, EPA undertook significant efforts to clarify key aspects of the NSR program, with the goal of streamlining and modernizing NSR while providing certainty and lessening permitting burdens for applicants. EPA promoted these efforts as consistent with the Trump administration’s goals of revitalizing manufacturing and growing the economy by removing obstacles and incentivizing investments in critical energy infrastructure. While many of these changes were welcomed by permittees, they were met with criticism from some states and environmental advocacy groups who argued that EPA’s actions weakened the NSR program. In light of these criticisms, the future of EPA’s NSR reform actions is uncertain under the Biden administration. Set forth below is a recap of recent EPA actions affecting NSR permitting and their current status.

### **Project Aggregation**

In a final action published in the Federal Register on November 15, 2018 entitled *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Aggregation; Reconsideration*, EPA concluded its reconsideration and lifted its indefinite stay of an action first taken in January 2009 during the waning days of the Bush administration. See 83 Fed. Reg. 57324-57333. After many years, EPA finalized its Project Aggregation interpretation for determining the scope of a “project” subject to NSR applicability evaluation.

Determining the scope of a project subject to air permitting is necessary for quantifying the emission increase associated with the project, and the amount of the emission increase is key to determining whether or not the project will be subject to NSR program requirements. Specifically, under the two-step applicability analysis established by the federal NSR regulations, if a project is determined to cause a significant emission increase of a regulated NSR pollutant (Step 1), it must then quantify the net emission increase of that pollutant from projects occurring during a five-year contemporaneous period (Step 2) to determine whether the NSR significance threshold is exceeded and thus NSR requirements are triggered. If

the emission increase is not significant in Step 1, the net emission increase analysis of Step 2 is not required, and the project does not trigger NSR.

Project Aggregation concepts ensure that emission increases from nominally separate projects occurring at a source are aggregated when compared to NSR thresholds in Step 1 where appropriate, so that NSR program requirements are not circumvented via project splitting. Recognizing that determining the scope of a project is a case-by-case exercise, EPA noted that EPA's interpretations historically had been applied through project-specific letters and memoranda; EPA's 2009 action sought to instead establish clear principles of Project Aggregation through a more formalized interpretation of the NSR rules.

In the 2018 Project Aggregation action, EPA reaffirmed its 2009 action, including the following:

- First, sources and permitting authorities should aggregate projects that are “substantially related.” The factors that should be considered in evaluating whether projects are substantially related include factors indicative of the technical or economic dependence of projects. EPA specifically rejected a broader approach to aggregation that would consider as related any projects that contribute to the source's overall basic purpose.
- Second, there is a rebuttable presumption that projects occurring more than three years apart are not substantially related, and therefore should generally not be aggregated. EPA views this general rule as consistent with the notion that the farther apart projects are timed, the less likely they are to be related, since such activities would likely be part of distinct planning and capital funding cycles. Importantly, EPA did not establish a presumption that projects occurring within three years of each other should be aggregated, concluding instead that the projects' technical and economic relationships should govern the analysis.
- Third, EPA noted its observation that the source itself is responsible for defining the scope of its project, subject to the limitation that the source cannot seek to circumvent NSR by splitting a single project into multiple projects.
- Finally, EPA noted that state and local air permitting agencies with approved NSR programs are not required to adopt EPA's Project Aggregation interpretation.

EPA's Project Aggregation action was challenged by the Natural Resources Defense Council via petition for judicial review in January 2019, and the challenge was consolidated with a challenge to EPA's 2009 action, which had been held in abeyance pending completion of EPA's reconsideration proceedings. According to the Court's docket, the petitions were voluntarily dismissed in June 2019.

### **Project Emission Accounting**

EPA published its final rule entitled *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting* in the Federal Register on November 24, 2020. 85 Fed. Reg. 74890-74909. The rule further clarifies the two-step process established under the federal NSR regulations for determining whether a project would result in a significant net emission increase, and thus trigger NSR requirements. As described above, Step 1 is a determination of whether the project would cause a significant emission increase of a regulated NSR pollutant. If so, Step 2 would then require a determination of whether a significant *net* emission increase would occur, by quantifying the net emission

increases and decreases over the contemporaneous (five-year) period as compared to the significance level established for the relevant NSR pollutant.

The NSR regulations include specific procedures for quantifying the Step 1 increase depending on whether the project occurs at a new or existing source. However, EPA acknowledged longstanding confusion and uncertainty among permitting authorities and other stakeholders as to whether emission *decreases* could be taken into account in Step 1 of the process, including in the context of projects that include multiple emission sources.

This question is meaningful because projects that are determined not to be “significant” in Step 1 are not required to proceed to the net emission increase quantification of Step 2, and therefore are not subject to NSR under the federal regulations. EPA’s final rule clarified that decreases may be considered in Step 1 for projects that involve new sources, existing sources and multiple types of sources (both existing and new), and by clarifying that the phrase “sum of the difference” used in the Step 1 regulatory language includes both emissions increases and decreases.

Together with the Project Aggregation rule discussed above, the Project Emission Accounting Rule provides flexibility to applicants to define the scope of a project subject to an NSR trigger evaluation, and to identify and quantify both increases and decreases associated with that project. At proposal, environmental groups and a coalition of state attorneys general criticized the Project Emission Accounting rule. These criticisms included assertions that the rule would weaken the NSR program by allowing sources to “net out” at Step 1 of the two-step regulatory analysis in a manner that is inconsistent with the goals of the NSR program. Critics argued that the Project Emission Accounting rule removes necessary boundaries in Step 1 by allowing a project to include multiple types of emission units (new and existing), and by allowing for consideration of decreases that are not creditable or enforceable, subject only to certain recordkeeping requirements that apply if there is a “reasonable possibility” that a significant emission increase may occur (i.e. where the projected increase in emissions equals or exceeds 50% of the applicable NSR significance level).

While the Project Emission Accounting rule is now effective, the period for filing petitions for judicial review or administrative reconsideration of the rule has not yet passed as of this writing, and the rule is likely to be challenged. EPA’s stance in any such litigation or reconsideration proceeding remains to be seen. In the meantime, the practical effectiveness of the rule is limited to those states and territories where EPA is the permitting authority, or where a state or local permitting authority has been delegated authority to implement the federal NSR program rules on behalf of EPA (for example, many states have received delegated authority to implement the federal PSD program rules).

Importantly, where a state or local permitting authority has developed its own NSR permitting program that has been approved by EPA through a State Implementation Plan (“SIP”), application of the Project Emission Accounting Rule will be subject to the discretion of the state or local authority. This will be most relevant to those states that have developed SIP-approved Non-Attainment NSR programs; in the final rule, EPA determined that state programs would meet the minimum stringency requirements required by the Clean Air Act even if they choose not to revise their regulations consistent with the new Project Emission Accounting Rule. For that reason, many states, including those that objected to the rule at proposal, may reasonably be expected to maintain their current approach to the NSR two-step analysis.

## Adjacency and Common Control

Under the Trump administration, EPA undertook two important actions in clarifying the circumstances under which one or more facilities may be considered to constitute a single stationary source for purposes of NSR and Title V permitting analyses. Where one or more sources are combined, their emissions are likewise combined for comparison to NSR and Title V applicability thresholds. By way of background, single source determinations rely on a three-factor test that considers whether one or more sources: 1) belong to the same industrial grouping; 2) are located on contiguous or adjacent properties; and 3) are under the common control of the same person (or persons under common control). The adjacency and common control factors of this analysis have been subject to years of uncertainty based on numerous and sometimes divergent applicability determinations, many of which have included considerations of functional interrelationships between two otherwise separate facilities. In its recent actions, EPA has now sought to limit the consideration of functional interrelationships in this context.

EPA's Acting Assistant Administrator Anne Isdal issued a memorandum to EPA's Regional Administrators on November 26, 2019 entitled *Interpreting 'Adjacent' for New Source Review and Title V Source Determinations in All Industries Other Than Oil and Gas*.<sup>1</sup> The memo notes that while the meaning of "contiguous" has been applied consistent with its dictionary definition to require physical contact, the meaning of "adjacent" has been considered to include facilities that are not physically touching but are otherwise "nearby" to one another.

With no bright-line standard for determining the physical distance that may constitute adjacency, EPA's determinations have included examinations of whether one or more facilities are otherwise functionally related through numerous "fine-grained" analyses. Through the Isdal memo, EPA rejected the concept of functional interrelatedness as an indicator of adjacency and instead reaffirmed the reasoning of the Sixth Circuit in *Summit Petroleum v. EPA*, 690 F.3d 733 (6<sup>th</sup> Cir. 2012), in which "adjacent" was interpreted to refer only to physical proximity and not to the functional relationships between two facilities. In sum, EPA clarified that it would interpret "adjacent" to include properties that are not physically touching – including those that are separated by a right of way or other similar separation – only when they are otherwise in reasonably proximity to one another. EPA will not consider functional interrelationships to establish adjacency.

EPA addressed longstanding confusion and permitting burdens associated with "common control" analyses in its April 30, 2018 Letter from Assistant Administrator William Wehrum to Patrick McDonnell, Secretary of PADEP, relating to the construction of a biogas processing facility by Meadowbrook Energy LLC. The Meadowbrook determination considered whether the Meadowbrook biogas facility should be considered under common control with the Keystone Sanitary Landfill, where Keystone would deliver untreated landfill gas via dedicated pipeline to Meadowbrook, which would then process the gas for conversion to pipeline quality renewable natural gas product for subsequent market sale.

Recognizing the lack of a clear definition of "common control," the Meadowbrook letter cited prior determinations in which EPA had considered a range of factors for assessing whether two sources are under common control, including but not limited to shared workforces, shared management, shared administrative functions, shared equipment, shared intermediates or byproducts, shared pollution control responsibilities, and support/dependency relationships. In these determinations, EPA often found common

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<sup>1</sup> The determination of adjacency for oil and gas facilities was addressed through a rulemaking specific to that category. *See* 80 Fed Reg. 35622 (June 3, 2016).

control based on the existence of mutually beneficial contractual arrangements whereby economically or operationally interconnected facilities exert influence over one another. Rejecting this historic multi-factor approach as resulting in a lack of clarity and inconsistent outcomes, EPA clarified in the Meadowbrook letter that the assessment of control for NSR and Title V should focus on the power or authority of one entity to dictate decisions of the other that could affect the applicability of, or compliance with, relevant air pollution control regulatory requirements. In narrowing its interpretation of common control, EPA expressly noted in the Meadowbrook letter that mutually beneficial contractual or other arrangements between two separately owned facilities may create economic or operational dependencies but should not be presumed to constitute common control.

EPA's actions in clarifying the adjacency and common control factors of single source determinations share several important features that may limit their application under the Biden administration or would allow states to apply these concepts differently. First, in each context, EPA has effected these changes informally through guidance memoranda or facility-specific determination. As such they may be a target for reversal or further clarification, although in so doing the Biden administration may need to consider any applicable restrictions of EPA's new rule: *EPA Guidance: Administrative Procedures for Issuance and Public Petitions*, 85 Fed. Reg. 66230-66240 (October 19, 2020). Second, in each action EPA has made clear that its new interpretations are not binding on state and local permitting authorities with their own EPA-approved Title V and NSR programs. Finally, in each context, EPA has made clear that its new interpretations of adjacency and common control should be applied prospectively and should not be used as a basis to revisit prior permitting determinations where no changed facts would otherwise warrant. Subsequent EPA determinations in the common control context have borne out this principle. See e.g., Letter from Cristina Fernandez to Brett Sago, Eastman Chemical, dated February 12, 2020.

### **Other Guidance**

In addition to the actions noted above, other NSR-focused guidance has been issued by EPA, as follows:

#### **Plantwide Applicability Limits**

On August 4, 2020, EPA finalized its *Guidance on Plantwide Applicability Limitation Provisions Under the New Source Review Regulations* (the PAL Guidance). The PAL Guidance sought to reduce uncertainty and perceived risk associated with NSR PAL provisions, which were first introduced in EPA's 2002 NSR reform rule to allow for a facility-wide cap for a regulated NSR pollutant below which projects could be undertaken without NSR review. With only 70 PAL permits issued since 2003, the PAL Guidance sought to address uncertainties identified by stakeholders in the areas of PAL permit reopening, PAL expiration, PAL renewal, PAL termination, PAL monitoring requirements, and baseline actual emissions for replacement units among others. The PAL Guidance reiterates the advantages posed by PAL permits for consideration by permit applicants. While not subject to the same level of criticism as some of EPA's other NSR actions, it remains to be seen whether the PAL Guidance may spark increased utilizations of PAL permits.

#### **Begin Actual Construction**

In March 2020, EPA issued a draft guidance for public comment entitled *Interpretation of 'Begin Actual Construction' Under the New Source Review Preconstruction Permitting Regulations*. The guidance is relevant to the prohibition in the NSR regulations that no new major stationary source or major modification to which the NSR requirements apply shall begin actual construction without first securing a permit stating that the source will meet NSR requirements. The draft guidance notes that EPA's current interpretation would consider almost every on-site physical construction activity of a permanent nature to constitute the beginning of "actual construction" even where the activity does not involve construction of an emission unit.



After detailing the long history of EPA's interpretations of "begin actual construction" the draft guidance puts forth a revised interpretation that would allow a permittee to undertake physical on-site activities that may alter the site or are permanent in nature, so long as the activities do not constitute physical construction on an emissions unit, as defined in EPA's regulations. Allowed activities would include those that are necessary to accommodate an emissions unit, however all such construction is undertaken at the permittee's risk (i.e. in the event that the permit is ultimately denied or contains required design changes). EPA's draft guidance was open for public comment until May 11, 2020 and met with mixed feedback.

While industry groups largely supported the draft guidance, some concerns were expressed by environmental groups and states. As of this writing, the guidance has not yet been finalized, and therefore the fate of this guidance under the Biden administration is uncertain.

### **Projected Actual Emissions**

Former EPA Administrator Scott Pruitt released a memorandum to EPA's regional administrators in December 2017 entitled *New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected-Actual Applicability Test in Determining Major Modification Applicability*. The memo signaled a significant shift in EPA's approach toward NSR enforcement, focusing on the NSR applicability triggers for an existing major source undergoing modification. First, the memo clarified that in the Step 1 determination of whether a project would cause a significant emission increase of a regulated NSR pollutant, a source's quantification of "projected actual emissions" may consider, as part of the projection, its own intention to actively manage future emissions to prevent a significant emissions increase from occurring. Second, in considering whether future emission increases may be subject to exclusion based on demand growth, the memo indicated that the source must exercise its own judgment in excluding emission increases for which the project is not the predominant cause, and that EPA will not second guess such projections. Instead, the memo points to NSR's post-project monitoring, recordkeeping and reporting requirements as the appropriate means by which EPA may evaluate the source's pre-project conclusion that NSR was not triggered. Finally, the memo indicates that where projected emissions increases are less than the NSR thresholds, EPA will focus on the source's post-project actual emissions in determining whether to pursue an enforcement action.

Like EPA's other NSR actions described above, EPA clarified in this context that SIP-approved state and local NSR regulations continue to have primacy in their jurisdictions. Further, a Biden EPA may be expected to exercise its enforcement discretion differently than described in this memo.

### **Conclusion**

As described herein, EPA has been very active over the past several years in clarifying longstanding issues in the NSR program requirements. Stakeholder groups have expressed diverging views on these actions, and their practical effect on permit applicants and prospective projects may not be fully realized if reversed or abandoned by the EPA under the Biden administration or are not adopted by states.

## Trump's EPA Makes a Late Push to Revive the Startup, Shutdown, and Malfunction Exemption, but Will It Get Out of the Starting Gate?

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The underpinnings of the so-called the startup, shutdown, and malfunction (SSM) exemption date back to the Clean Air Act (CAA) amendments of 1970, when it was widely believed that emission limits intended to apply during “normal” operations could not also be met during SSM periods using the same emission control strategies. At that time, SSM periods were thought to be different from normal operating scenarios. On this basis, many states incorporated into their original CAA implementation plans, known as “SIPs,” provisions for more lenient treatment of excess emissions during SSM periods, including some that exempted such emissions from legal control altogether. EPA approved the original SIPs in the early 1970s.

Not more than a decade later, EPA started interpreting normal operations in the ordinary sense, distinguishing between predictable modes of operation including startup, shutdown, and maintenance, as compared to malfunctions, which are supposed to be limited to unpredictable and unforeseen events that cannot reasonably be prevented. The Agency began communicating to state permitting authorities that exemptions for excess emissions during SSM periods are inconsistent with the CAA, and in the years that followed, a small number of SIPs were determined to be deficient on this basis. But EPA did not undertake a broad effort to require the removal of impermissible SSM provisions from a larger number of SIPs until 2015, when the Agency responded to a rulemaking petition filed by Sierra Club (and other related legal proceedings) to address the SIPs that still included blanket exemptions for excess emissions during SSM periods and similarly lenient provisions. That 2015 response by EPA is commonly referred to as the SSM SIP Call.

While ultimately nuanced, the SSM SIP Call essentially memorialized EPA's then-current policy on the legality of SSM provisions and issued a call to action to nearly 40 states to revise their SIPs consistent with such policy, including by removing automatic exemptions from emission limits and impermissible discretionary provisions, such as those that effectively bar EPA enforcement or the filing of citizen suits, as well as certain affirmative defense provisions. Affected states were given 18 months to revise their SIPs, and some did, resulting in state regulatory changes that filtered down to the facility air permit level in many cases. Others filed legal challenges to the SSM SIP Call with the D.C. Circuit Court of Appeals, but by the time the cases were ready for oral argument, the Trump administration had assumed control of EPA and the Court granted EPA's request to put the cases on hold while the Agency reconsidered its SSM policy from the ground up.

With timing being everything, Trump's EPA issued on October 9, 2020, a new policy memorandum entitled “Inclusion of Provisions Governing Periods of Startup, Shutdown, and Malfunctions in State Implementation Plans” (the “2020 SSM Policy Memo”). The 2020 SSM Policy Memo is identified as superseding and replacing certain policy statements in the 2015 SSM SIP Call action, and concludes that SSM provisions in SIPs, even automatic exemptions and so-called “director's discretion” provisions, *are permissible* in many cases, although it does not (because it legally cannot absent a separate rulemaking) upend the specific determinations from 2015 that certain SIPs are inconsistent with the CAA. Still, EPA makes clear that it plans to review each SIP call remaining from the 2015 action, and all future proposed SIP actions, in light of the Agency's new policy.

Only time will tell what will happen to the Agency's new SSM policy, as even the best-laid plans can go awry with a new administration taking office in matter of days. But because EPA's position on SSM provisions is policy-based, and was not codified through a formal rulemaking process, it can be reversed just as easily, with the issuance of yet another policy memorandum. For this reason, is reasonable to expect that the 2020 SSM Policy will to be undone by the incoming Biden administration.

## **Are Changes to EPA's Risk Management Program "Ripe for the Picking" in the Early Days of the Biden Administration?**

***Michael Dillon, Esq. and Michael C. Nines, P.E., LEED AP, Technical Consultant***

In the waning days of the Obama administration on January 13, 2017, EPA published its substantive final rule amendments to the Risk Management Program (RMP) regulations at 40 C.F.R. Part 68. The final rule came in response to Executive Order 13650, which ordered federal agencies to take actions to improve chemical facility safety and security. The amendments to the RMP regulations applied to any facility holding more than a threshold quantity of a "regulated substance," and included facilities in the chemical manufacturing, oil and gas extraction, agricultural, petroleum refining, and food and beverage sectors among others. The 2017 RMP Amendments made significant enhancements to the RMP program's accident prevention, emergency response, and data availability provisions including obligations for certain facilities to conduct root cause analyses in response to certain release events and to perform third-party audits after an RMP reportable accident; enhanced coordination between regulated facilities and local emergency response agencies; and mandatory public meetings with local communities impacted by RMP reportable accidents.

Almost immediately upon taking office, the Trump administration temporarily delayed the effective date of the 2017 RMP Amendments before signing a final rule on June 9, 2017 delaying the effective date of the RMP rule amendments until February 19, 2019. After having delayed the effective date of the 2017 RMP Amendments, EPA formally modified the rule through publication of the RMP Reconsideration Rule on December 19, 2019. The 2019 RMP Reconsideration Rule modified the 2017 RMP Amendments by removing what the Trump administration deemed burdensome, costly, and unnecessary amendments while maintaining appropriate protections and ensuring first responders have access to all the necessary safety information. Most significantly, the 2019 RMP Reconsideration Rule rescinded all major accident prevention program provisions of the 2017 RMP Amendments (i.e., third party audits, safer technology and alternatives analyses, incident investigation root cause analysis), and most other minor changes to the prevention program. The 2019 RMP Reconsideration Rule also rescinded the public information availability provisions of the 2017 RMP Amendments.

Based on this recent history, it seems highly likely that the incoming Biden administration will take a hard look at the RMP program and consider undoing the recent rollback of RMP requirements promulgated under the Trump administration. Although further change to the RMP program may be inevitable, this type of push/pull can have significant ramifications to the regulated community who would be tasked with complying with shifting legal requirements. While management of change is a central feature of accident prevention as it relates to ever-changing processes, chemicals, equipment, and related hazards, it is not normally one found within the confines of an established regulatory framework such as RMP.

## **What to Expect from the Renewable Fuel Standards Program in 2021**

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As the Trump administration raced to roll back or weaken Obama-era regulations and guidance in the latter half of 2020, it opted to punt on the politically charged decision of setting standards for the Renewable Fuel Standards (RFS) program for the 2021 calendar year. The RFS program is codified at Section 211(o) of the Clean Air Act (Act) and establishes minimum volume requirements for four separate categories of renewable fuels: (1) total renewable fuels; (2) advanced biofuels; (3) biomass-based diesel; and (4) cellulosic biofuels. The volume requirements for total renewable fuels, advanced biofuels, and cellulosic biofuels increase each year through 2022, whereas the volume requirements for biomass-based diesel increased each year through 2012. After these years, EPA is responsible for establishing the annual volume requirement through rulemaking.

To ensure that the annual volume requirements are met, EPA is required by the Act to publish annual percentage standards by November 30 of each year. Such standards are to remain in effect for the following compliance year. The annual percentage standards are used by refiners and importers of transportation fuel to determine their individual renewable volume obligation.

In a widely expected move (or more accurately, non-move), EPA missed the November 30, 2020 deadline to establish the RFS standards for 2021 (except for biomass-based diesel where EPA established the 2021 standard in 2019). EPA had sent a proposed RFS rule to the White House Office of Management of Budget (OMB) in mid-May 2020, but the rule has not been released by OMB for public comment. EPA's Administrator, Andrew Wheeler, noted that the 2021 standards had been largely drafted before the COVID-19 pandemic. The pandemic drastically affected gasoline and ethanol consumption in 2020 and makes EPA's job of setting RFS standards exceedingly difficult. The challenging task will instead be left to the incoming Biden administration.

In addition to establishing the 2021 annual volume requirements, the Biden administration also will be left with the decision on whether to grant requests made by small refiners for exemptions from the annual volume requirements. During his campaign, Biden criticized the small refinery exemption and signaled that his administration would significantly limit the number of exemptions.

## **HAZARDOUS SUBSTANCES and REMEDIATION:**

### **Biden Administration Poised to Implement TSCA Requirements**

***Todd D. Kantorczyk, Esq.***

A number of Toxic Substances Control Act initiatives bear watching in 2021.

First, the incoming Biden administration will be charged with implementing key components of the 2016 TSCA amendments and could use that authority to expand EPA's view as to whether an existing chemical presents an unreasonable risk of injury to health or the environment. As of the date of this publication, EPA had completed seven of the risk evaluations for the "first ten" high priority substances and has indicated that two more will be completed before Inauguration Day. The Biden administration may look for opportunities to reopen one more of these risk evaluations and employ a revised approach (such as looking at other uses, exposure routes, and sensitive subpopulations) which could alter the initial conclusions.

For example, in July, a coalition of environmental groups and unions filed a petition in the 9<sup>th</sup> Circuit Court of Appeals challenging EPA's final risk evaluation for methylene chloride. The Biden administration could use this petition as a vehicle to revisit that risk evaluation. Similarly, in September EPA issued final scopes of risk evaluations for the "next twenty" high priority substances. The Biden administration could reexamine these scopes and ultimately approach the risk evaluation process for these chemical substances in a fundamentally different way that increases the likelihood of finding uses that present unreasonable risks.

The Biden administration will also have the opportunity to influence the outcome of several other pending, planned or court-directed TSCA actions in 2021. First, EPA recently released a new proposed TSCA fee rule, which will govern the fees manufacturers, importers, and certain processors are required to pay to fund EPA's costs to implement TSCA. The proposed rule includes new exemptions for certain manufacturers and importers that are analogous to the current Chemical Data Rule (CDR) exemptions.

EPA is also scheduled to address a number of other TSCA rules in the near future, including:

- (1) a rule governing a one-time reporting event of per- and polyfluoroalkyl substances (PFAS) manufactured or imported after January 1, 2011;
- (2) a rule revising the process by which EPA reviews and makes determinations on premanufacture notices for new chemicals; and
- (3) new rules on submitting and supporting confidential business information claims.

Finally, at the very end of 2020, a federal court in the Northern District of California ordered EPA to revise the CDR with respect to asbestos, and "address" certain exemptions, exclusions and the reporting threshold. This and the noted rulemakings will afford a full TSCA plate for the new EPA Administrator.

## **Federal Regulation and Legislation of PFAS Expected to Accelerate in 2021**

***John F. Gullace, Esq. and Austin W. Manning, Esq.***

In 2020, the Environmental Protection Agency (EPA) took several significant actions to address per- and polyfluoroalkyl substances (PFAS) contamination across various mediums that will likely continue to evolve in 2021.

In March of 2020, EPA published a preliminary determination to regulate two forms of the chemical, perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS), under the Safe Drinking Water Act. It is anticipated that EPA will publish and ultimately promulgate a Maximum Contaminant Level and final National Primary Drinking Water Regulation for PFOA and PFOS in 2021.

2021 will also see the implementation of some form of EPA's interim strategy for PFAS in federally issued National Pollutant Discharge Elimination System (NPDES) Permits which was published at the end of November 2020. The strategy includes recommendations to incorporate permit requirements for PFAS monitoring and best management practices, as well as the use of the NPDES Permit Writers' Clearinghouse platform to share PFAS-specific knowledge.

In June of 2020, EPA published a final rule incorporating the addition of 172-PFAS to the list of toxic chemicals covered by the Toxics Release Inventory (TRI) under the Emergency Planning and Community Right-to-Know Act. The first reporting deadline for PFAS under the TRI is July 1, 2021. Also, while the means by which this will occur are still unclear, it is anticipated that the Biden administration will press forward with designating PFAS as a hazardous substance under Section 102(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

Most recently, EPA released the interim guidance on the destruction and disposal of PFAS. Notably the interim guidance discusses the thermal treatment of PFAS containing waste which has been the subject of numerous lawsuits over the past year. EPA is accepting comments on the interim guidance up until February 22, 2021 and further action on these issues is to be expected.

Finally, EPA under the Biden administration is expected to accelerate the regulation and study of PFAS compounds in general, including their use, reporting, release and health effects. Coupled with these efforts, bi-partisan concern over human exposure to PFAS could result in legislation related to PFAS, even in a divided Congress.

## **Superfund Program Likely to Receive Fresh Scrutiny in 2021**

***Garrett D. Trego, Esq.***

Since taking office in 2017, the Trump administration's U.S. EPA leadership consistently named the Superfund site remediation program as a priority, convening the [Superfund Task Force](#), [listing](#) priority sites with the highest potential for redevelopment or reuse, and [delisting](#) or partially delisting an increasing number of sites from the National Priority List during the term.

Like programs across the agency, the Superfund program is likely to see significant directional changes under the new Biden administration, with new EPA Administrator Michael Regan, formerly the Secretary of North Carolina's DEQ and an Environmental Defense Fund regional director, taking charge. Though the Superfund program is often immune to the drastic policy and enforcement shifts that may be experienced in some other environmental programs, stricter scrutiny, nevertheless, may be felt at some sites where the cleanup is federally-driven. New federal initiatives and areas to watch include:

- Reestablishing climate change resilience as a goal and review criteria for the establishment of remedies;
- Directly and indirectly including environmental justice concerns and initiatives among the factors driving remedial and removal action decisions;
- Increasing attention to perfluorinated chemicals and other emerging contaminants, as federal maximum contaminant levels are likely established for these constituents and states move to adopt their own standards; and
- Opening additional opportunities for third party participation, particularly in light of the United States Supreme Court's 2020 decision in *Atlantic Richfield v. Christian* (discussed in the [MGKF Litigation Blog here](#)) which may have opened doors for third party, state court lawsuits seeking additional remedial work at Superfund sites but may also require enhanced EPA coordination to achieve effective relief.

Change may come slower in the Superfund program, but broader policy changes from the EPA across other programs will provide clues for shifting priorities in the Superfund arena.

## **WATER:**

### **Back on the Merry-Go-Round: Efforts to Expand Federal Clean Water Act Jurisdiction Expected in 2021**

***Todd D. Kantorczyk, Esq.***

During 2020, the Trump administration completed its efforts to narrow the scope of a 2015 rule intended to define the extent of Waters of the United States subject to federal Clean Water Act (CWA) jurisdiction, but it is likely that the incoming Biden administration will take steps to revert back to the 2015 rule. In April 2020, the Trump administration published a final version of its “Navigable Waters Protection Rule”, which set out four categories of waters that would be federally regulated, and 12 categories of non-jurisdictional waters, including ephemeral waters, groundwater, most ditches, prior converted cropland, and waste treatment systems. A number of environmental organizations and a group of states and cities appealed the rule, which went into effect in June, in various jurisdictions, but only a federal judge in Colorado suspended implementation of the rule in that state.

Shortly after publication of the Navigable Waters Protection Rule, the Supreme Court issued a decision in [\*County of Maui v. Hawaii Wildlife Fund\*](#) and held that a CWA permit was required for point sources that discharge pollutants to groundwater if that discharge is the “functional equivalent of a direct discharge” to navigable waters. The Court declined to define “functional equivalent”, but instead provided seven factors that should be evaluated in any given situation, the most important being transit time and distance. In December, the Trump administration released its own draft guidance on how to apply the *Maui* decision going forward, adding another factor: pollutant composition and concentration at the time it enters the navigable water as compared to the initial discharge. The draft guidance was published in the Federal Register for public comment, and comments are due by January 11, 2021.

The incoming Biden administration is expected to take steps to undo the Trump administration’s efforts to narrow the scope of CWA permitting. In the near term, it is likely that Biden’s Department of Justice will seek a stay of the pending litigation over the Navigable Waters Protection Rule, to allow the administration to evaluate its substantive and procedural options to revise the rule. Furthermore, it is expected that EPA will withdraw the recently published guidance on applying the *Maui* decision and eventually replace it with guidance that reads the Supreme Court’s decision more broadly. Any of these actions will likely result in lawsuits filed by the same groups that opposed the 2015 rule. Some of those lawsuits enjoined enforcement of the 2015 rule in certain jurisdictions, which resulted in a patchwork framework where the applicable federal rule depended upon the particular state.

### **Choppy Waters Ahead - NPDES Permitting for Discharges through Groundwater**

***Brenda H. Gotanda, Esq. and Megan A. Elliott, Esq.***

The U.S. Supreme Court, in its groundbreaking decision last year in *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020), ruled that the Clean Water Act (CWA) requires a permit for a point source discharge through groundwater to navigable waters under certain circumstances and it established

a new standard likely to see significant interpretation by regulatory authorities, permit writers, and courts in the year ahead.

In the *Maui* case, the Court held that a permit issued under the CWA National Pollutant Discharge Elimination System (NPDES) program is required for a discharge originating from a point source that is conveyed to navigable waters by a nonpoint source such as groundwater “if the addition of the pollutants through groundwater is the **functional equivalent** of a direct discharge from the point source into navigable waters.” *Id.* at 1468. In its ruling, the Court focused on both the statutory intent and the statutory language that the pollutant must be “from” a point source. It held that the intent of the CWA was to provide federal regulation of sources of pollutants to navigable waters, while preserving longstanding state regulatory authority over groundwater and other non-point sources of pollution. Whether pollutants arriving at navigable waters after traveling through groundwater, or other indirect pathways, are deemed to be “from a point source” and require an NPDES permit, the Court ruled, will depend upon how similar to (or different from) they are to a direct discharge to navigable waters.

Recognizing the potential difficulty in applying this new, somewhat amorphous, standard, the Court in *Maui* provided a non-exclusive list of seven factors that may be relevant in making permitting determinations. Those factors include: (1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, (6) the manner by or area in which the pollutant enters the navigable waters, and (7) the degree to which the pollution has maintained its specific identity at the point of discharge. The Court noted that these factors may need to be weighted differently in different cases and that other factors may also apply depending upon the circumstances.

Regulatory agencies are now beginning to interpret and apply the new standard and the functional equivalent factors. On December 10, 2020, EPA published in the Federal Register, with a 30-day public comment period, a [draft guidance](#) document on how to apply the *Maui* decision’s functional equivalent analysis within the existing permitting framework to discharges reaching navigable waters through groundwater. The draft guidance, intended to clarify the analysis for the regulated community and permit writers, reviews basic permitting principles and adds a new factor to consider, but does not provide much additional detail with regard to the seven functional equivalent factors. It does note, however, that what happens to a discharged pollutant over the time and distance traveled to the navigable waters is critical to the functional equivalent analysis and that the science (e.g., characteristics of the pollutant itself and the nature of the subsurface aquifer and hydrogeology) informs those factors. It adds that there must be an actual, not potential, discharge from a point source and that not all discharges to groundwater that reach navigable waters will be the functional equivalent of a direct discharge.

The new factor to consider in the functional equivalent analysis, identified by EPA in the draft guidance, is the design and performance of the system or facility from which the pollutant is released. EPA states that this type of information is important, relevant, and routinely considered by permitting agencies. Further, it adds that the design and performance of a system or facility can affect or inform all of the other *Maui* factors. For example, a facility may be designed to slow the transit time of a pollutant or increase the distance it must travel to a navigable water. Likewise, the design may “promote dilution, adsorption or dispersion of the pollutant, thereby affecting the extent to which the pollutant is chemically changed, the amount of pollutant entering the water of the United States relative to the amount of the pollutant that



leaves the point source, and the degree to which the pollutant has maintained its specific identity at the point it reaches a water of the United States.” (Draft Guidance, p.7)

The close of EPA’s public comment period on the draft guidance on January 11, 2021 will occur prior to the inauguration of President-Elect Biden. Whether the Trump Administration intends to finalize the draft guidance before it leaves office remains an open question. We do anticipate, however, that a Biden Administration will likely revisit this guidance and interpretation as it begins to implement its own regulatory priorities.

We also expect to see, in the year ahead, further refinement of the functional equivalent analysis through state level permitting guidance, as well as court decisions applying the standard in individual cases. In the interim, facilities with existing discharges to groundwater that may reach navigable waters should consider evaluating available information regarding their discharge against the *Maui* functional equivalent factors to assess potential risk that the permitting agency may now require a permit even if one was not previously required by the agency.

## **EPA’s Unregulated Contaminant Monitoring Rule 5 to Include an Expanded List of PFAS Constituents and Additional Public Water Systems**

***Michael Dillon, Esq. and Michael C. Nines, P.E., LEED AP, Technical Consultant***

The Safe Drinking Water Act (SDWA), as amended in 1996, requires that EPA establish a program to monitor specified unregulated contaminants every five years from Public Water Systems (PWS). The monitoring effort historically consisted of data collection from large PWS systems (serving > 10,000 people) and representative small PWS serving less than or equal to 10,000 people. EPA published the first Unregulated Contaminant Monitoring Rule (UCMR) in 1999. Twenty-plus years later, EPA is gearing up for its 5th cycle of unregulated contaminant monitoring under the pending UCMR 5. The data collected through UCMR 5 will be stored in the National Contaminant Occurrence Database and will be used to support the EPA Administrator’s determination as to whether regulation of previously unregulated contaminants is warranted. The selection of contaminants in the pending UCMR 5 cycle is based on a review of the Contaminant Candidate List (CCL), which is a list of contaminants that are not currently regulated by EPA under the national drinking water regulations.

As part of the pending UCMR 5 rulemakings, EPA is set to propose monitoring for over 20 different types of Per- and Polyfluoroalkyl Substances (PFAS). The proposed UCMR 5 rulemaking was originally scheduled for publication in 2020, however due to delays, we now anticipate it to be early 2021. Following a public comment period, the final UCMR 5 rulemaking is scheduled to be released by the end of 2021. Once finalized, the UCMR 5 monitoring period will cover the years 2022 through 2026. The inclusion of an expanded list of PFAS in the UCMR 5 would fulfill a key commitment in EPA’s 2019 PFAS Action Plan by proposing the collection of more drinking water occurrence data for a broader group of PFAS, utilizing newer analytical methods at lower minimum reporting levels than previously possible.

Also of importance to the UCMR 5 rulemaking efforts, the SDWA amendments under P.L. 115–270, known as America’s Water Infrastructure Act of 2018 (AWIA), will now expand unregulated contaminant monitoring requirements to include all public water systems serving 3,300-10,000 individuals. This requirement will

take effect on October 23, 2021 (three years after the enactment of AWIA). This amendment to the SDWA could result in approximately 5,000 additional PWS being brought into the UCMR 5 monitoring program.

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## **SEPs Set for Comeback in Federal Settlements**

***Todd D. Kantorczyk, Esq.***

In March 2020, the Assistant Attorney General at the United States Department of Justice Environment and Natural Resources Division (ENRD) issued a guidance memo that effectively ended the practice allowing defendants to provide environmental goods or services, otherwise known as Supplemental Environmental Projects (SEPs) as part of civil settlements. The guidance argued that the practice of allowing SEPs violated federal law and may be unconstitutional because they amounted to a reallocation of monies owed to the federal government without Congressional approval. Shortly thereafter, EPA indicated that based on the ENRD guidance the agency would no longer include SEPs in administrative settlement agreements, except for diesel emission reduction projects in settlement of Clean Air Act violations (which had been previously authorized by Congress).

Critics of the ENRD guidance argued that SEPs have been an effective tool to remedy environmental harm and protect affected local communities, in particular environmental justice communities, in ways that could not be achieved through penalties alone. Moreover, 2015 EPA guidance effectively addressed any legal concerns by requiring a sufficient nexus between the underlying violation and the SEP. In October 2020, the Conservation Law Foundation filed a lawsuit in Massachusetts District Court arguing that the shift by ENRD violated the Administrative Procedures Act.

As described in more detail in other areas of this forecast, [environmental justice](#) is expected to play a key role in the Biden Administration's approach to federal environmental regulation and enforcement. Accordingly, it is likely that one of the first acts of Biden's ENRD appointees will be to rescind or revise the March 2020 memo to allow for SEPs to once again be used as part of civil settlements with ENRD. In addition, EPA will likely revert to its 2015 guidance to allow the use of SEPs for administrative settlements and may even revise the guidance to allow for more flexibility for their use. Accordingly, companies facing federal enforcement actions can expect SEPs to play a role in settlement discussions.

## **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<sub>2</sub> 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<sub>2</sub> 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<sub>2</sub> 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<sub>2</sub> 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<sub>2</sub> by 2030, approximately 96 million of that 183 million tons of CO<sub>2</sub> 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<sub>2</sub> 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. Env'tl. 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. Env'tl. 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. Env'tl. 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.

\* \* \*

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 (NO<sub>x</sub>) 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 reevaluate 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 NO<sub>x</sub> 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 ppmv @ 15 percent oxygen, down from 150 ppmv 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.

## **NEW JERSEY**

### **New Jersey Site Remediation Program Faces Key Issues in 2021**

***Bruce S. Katcher, Esq.***

The Site Remediation Program (SRP) is slated to see several key issues occupy the agenda in 2021. These are summarized below:

## **1. Expected Finalization of Major Rulemaking Revising Soil Remediation Standards**

In April 2020, NJDEP published a major proposal to revise the remediation standards for contaminated sites. That proposal will likely be finalized during the second quarter of 2020 and will have a number of implications for sites undergoing remediation.

As it stands, the proposal (summarized in our [April 8, 2020 Alert](#)) would revise and codify as regulatory standards for the first time both impact to groundwater soil remediation standards (including soil and soil leachate levels) and vapor intrusion standards. In contrast, both are currently contained in and applied through guidance documents without express regulatory imprimatur. It would also replace the direct contact soil remediation standards with separate soil remediation standards for the inhalation exposure pathway and the ingestion-dermal exposure pathway for both residential and non-residential scenarios. Finally, the proposal includes revised procedures for setting alternate remediation standards, adds and removes standards for some constituents and increases and decreases several standards. No changes were proposed to the groundwater remediation standards.

For those standards which are revised to be more stringent by an order of magnitude or more, remediations which were complete and for which a No Further Action (NFA) letter or Response Action Outcome (RAO) had been issued by NJDEP or an Licensed Site Remediation Professional (LSRP), respectively, will need to be re-evaluated to determine whether they continue to be protective of human health or the environment and if not, additional remediation may be required. Also, for remediations not yet complete, the new standards will apply except for matters where a remedial action workplan incorporating the old standards was approved by the Department or an LSRP or a remedial action report was submitted with the old standards, in which case a similar order of magnitude analysis of the remedial action and possible further remediation would be required. In addition, more rigorous evaluation of exposure pathways may be necessary while the remediation process is ongoing given that both the inhalation and dermal exposure pathways must be evaluated for compliance with their respective standards. The Department's existing phase-in rules should be consulted to further determine when the new standards first apply to ongoing cases.

## **2. May 7, 2021 Deadline for Completion of Remedial Actions**

A large number of outstanding SRP cases could be facing a deadline to complete remediation by May 7, 2021 which could create complications for LSRPs, remediating parties and the NJDEP.

When the Site Remediation Reform Act (SRRA) was enacted in 2009, special provisions were included to apply to older pending cases that were designed to bring those cases to completion. These provisions focused attention on cases for which a discharge was identified prior to May 7, 1999 or which should have been discovered by that date under certain specified statutory or enforcement requirements. This subjected a large number of outstanding cases to a statutory deadline for the remedial investigation (RI) of May 7, 2014 which, pursuant to the mandatory timeframes set forth in the applicable SRP regulations, subjected these old cases with multimedia contamination to a remedial action completion deadline of May 7, 2021. (Cases which qualified for a two-year statutory extension of the RI deadline are not covered by the 2021 deadline.)

When these cases are combined with other post-May 7, 1999 cases which, in the ordinary course of the remediation process, are facing mandatory deadlines on the same date, this could result in a very large

number of cases for which remediation must be complete (i.e., a RAO has been issued by a LSRP) by May 7, 2021. In turn, this could lead to a large backlog of submissions for remedial action permits which must be approved by NJDEP before a RAO can be issued for cases utilizing institutional or engineering controls, thereby resulting in delays in the issuance of RAOs beyond the May 2021 deadline. Similarly, while an extension process is available under the SRP regulations, it may be difficult to justify further extensions of this timeframe for cases that are already considered to be very old by NJDEP.

If the deadline is missed, this could result in cases falling into NJDEP direct oversight status (which requires the posting of financial assurance in the form of a trust fund and affords NJDEP the authority to select the remedial action) and potential civil penalties. While limited relief from some of the direct oversight requirements may be available under the 2019 SRRA amendments, including an administrative consent order to adjust certain of the direct oversight requirements, the strictures of such orders are certainly not preferable to meeting the deadline or obtaining an extension. (See our [June 2019 Special Alert](#)).

This situation is further complicated by the temporary rule promulgated by NJDEP on August 17, 2020 that extended a number of SRP deadlines, including this one, by 270 days as long as the Governor's COVID Public Health Emergency Declaration Executive Order 103 remains in effect (see our [August 2020 Special Alert](#)). If EO 103 is still in effect on May 21, 2021, the deadline is extended, however, if EO 103 expires before that date, the deadline is not extended. All of this makes planning particularly important and dictates that careful consideration be given to completion of affected remedial actions, early filing of remedial action permit applications and seeking extensions where necessary. Parties responsible for conducting remediations and their LSRPs should be in the process of considering how to approach these deadlines where applicable.

### **3. Potential for New Standards**

As we've previously reported (see our [June 2020 Special Alert](#)), NJDEP adopted maximum contaminant levels and groundwater quality standards for two more perfluoroalkyl substances (PFAS) in 2020 - perfluorooctanoic acid (PFOA) at 0.014 micrograms per liter ( $\mu\text{g/l}$ ) and perfluorooctanesulfonic acid (PFOS) at 0.013  $\mu\text{g/l}$ . A standard for a third PFAS - perfluorononanoic acid (PFNA) - was previously set in 2018. These standards were based on the MCL recommendations of the New Jersey Drinking Water Quality Institute (DWQI). The DWQI is presently considering proposing a recommended MCL for 1,4 dioxane at .33  $\mu\text{g/l}$  which could eventually lead to a slight lowering of the groundwater quality standard which is presently set at .4  $\mu\text{g/l}$ . It is possible that the DWQI could also turn its attention to setting MCLs for additional PFAS in the coming year. Finally, with all the attention being focused on PFAS by the NJDEP and the Attorney General (see the articles elsewhere in this Forecast regarding [natural resource damages](#) and additional [regulation of PFAS](#) in New Jersey), it would not be surprising to see NJDEP begin the process to propose soil remediation standards for selected PFAS in 2021.

## **NJ Claims for Natural Resource Damages Likely to Continue in 2021**

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

Natural resource damages (NRD) appear to remain a priority of the Murphy administration, and consistent with the past two years, we expect to see additional NRD cases filed in the coming year. Because of the State's heightened focus on environmental justice (EJ) concerns, it is likely that new NRD actions will involve

sites in or near EJ communities. Last year, the New Jersey Department of Environmental Protection (NJDEP) and the Attorney General's Office initiated three new lawsuits seeking to recover NRD, bringing the number of NRD cases filed since the State revitalized its NRD initiative in August 2018 to a total of 15. The State has engaged private counsel in almost all the NRD cases and is expected to continue to do so moving forward.

Moreover, we expect that the State will continue its trend of asserting unconventional claims for relief in new NRD cases. As we projected in our [2020 Forecast](#), the State expanded its counts in the 2020 lawsuits to include unconventional claims for relief such as strict liability and negligence. Further, the State has even amended its Complaints in earlier filed NRD actions to add these counts. In addition, recent Complaints have sought NRD for alleged per- and polyfluoroalkyl substances ("PFAS") contamination, which is not surprising given NJDEP's adoption of maximum contaminant levels and groundwater remediation standards for perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) that became effective in June 2020 and the 2018 adoption of such standards for perfluorononanoic acid (PFNA).

We also anticipate that motion practice in the pending NRD cases will further shape the State's ability to bring and litigate NRD recovery actions. In April 2020, the New Jersey Appellate Division released a highly anticipated decision in which the court affirmed the dismissal of the State's common law trespass claim for lack of exclusive possession over the subject property. *New Jersey Department of Environmental Protection v. Hess*, A-2893-18T2 (N.J. Super. App. Div. Apr. 7, 2020). A more in-depth discussion of the *Hess* opinion can be found [here](#). With numerous dispositive motions challenging the State's common law and statutory claims for relief as well as its right to a jury trial pending in both state and federal courts, it is likely that there will be trial—and maybe even appellate—decisions this year which will further define the State's ability to bring and litigate cases seeking NRD.

Whether NJDEP will promulgate any regulations for the calculation of NRD in 2021 also remains unclear. Although last year NJDEP officials indicated that the agency is working on guidance related to NRD, there has been little information regarding what that guidance may concern and/or when it will be made available to the regulated community. The agency's failure to promulgate such regulations has drawn sharp criticism from New Jersey courts in the past and, given the continuing lack of properly promulgated criteria for calculating NRD, seems almost certain to leave the State open to further criticism by the courts concerning its approach to NRD recovery.

## **New Jersey's New Environmental Justice Law Set to Resonate Throughout 2021**

***Jill Hyman Kaplan, Esq. and Zachary J. Koslap, Esq.***

As reported in our [September 21, 2020 Alert](#), on September 18, 2020 New Jersey became one of the first states in the country to enact legislation (The Environmental Justice Law) that establishes a rigorous environmental justice review process for applicants seeking environmental permits from the New Jersey Department of Environmental Protection (NJDEP) for certain facilities in overburdened communities. The legislature's stated intent in passing the law, was to limit the placement or expansion of covered facilities requiring environmental permits in communities that have borne a disproportionate share of adverse environmental and public health consequences in the state.

The Environmental Justice Law was signed by Governor Murphy around the same time that NJDEP issued guidance to implement the Governor's Executive Order 23, which directs the agency to advance

environmental justice initiatives across state agencies. This combination of measures promises to resonate throughout 2021 and beyond as NJDEP moves to put into place a new set of regulations and the other agencies move to adopt policies and procedures to implement the new law and guidance.

The Environmental Justice Law applies to applicants seeking to obtain “individual permits” for named categories of new or expanded facilities in communities that the law considers to be overburdened based on minority, low-income or limited English proficiency demographic criteria spelled out in the law. Among the categories of facilities included are:

- (1) major sources of air pollution;
- (2) resource recovery facilities or incinerators;
- (3) sludge processing facilities;
- (4) large sewage treatment plants
- (5) transfer stations or other solid waste facilities and certain large recycling facilities
- (6) scrap metal facilities;
- (7) landfills, and
- (8) medical waste incinerators (except those at hospitals and universities).

The process set forth in the law requires these applicants to develop an environmental justice impact statement that assesses the potential environmental and public health stressors associated with the proposed new or expanded facility, including any stressors that cannot be avoided if the permit is granted, as well as existing stressors in the community. The applicant must then conduct a public hearing in the overburdened community and transmit a transcript of the hearing and any written comments received to NJDEP.

After NJDEP reviews the application, the environmental justice impact statement, and the comments received at the public hearing, NJDEP must deny an application for a new permit if NJDEP finds that the approval of the permit would, together with existing environmental or public health stressors, cause or contribute to adverse cumulative environmental or public health stressors in the overburdened community that are higher than those borne by other communities (as determined by NJDEP) within New Jersey. An exception is available for facilities that serve a compelling public interest in the overburdened community. For permit renewals and the expansion of an existing facility, NJDEP may attach conditions to (but cannot deny) the permit if it makes similar findings that the permit would cause or contribute to adverse cumulative environmental public health stressors.

The new process cannot be implemented until NJDEP issues final regulations governing the process. NJDEP has yet to propose the regulations but it has started to conduct stakeholder meetings and solicit comments. NJDEP has announced that it will continue to hold stakeholder meetings in 2021, beginning in January. Although the deadline for the initial round of comments has passed, NJDEP has indicated that it will continue accepting comments prior to its issuance of proposed regulations, which is not expected until the second quarter of 2021, followed by an extended public comment period on the proposal. In light of this schedule, final regulations would not be expected until late 2021 or early 2022, however, it is not too early for affected facilities to begin to consider the potential impact of the new law on future development and permitting decisions.



## **New Jersey PACT – Regulatory Activity to Expect in 2021 for Control of Greenhouse Gas Emissions and Land Use Regulation**

***Carol F. McCabe, Esq. and Diana A. Silva, Esq.***

This year will be busy for NJDEP, with the state's wide-ranging efforts to address climate change moving into a rulemaking phase. New Jersey's Protecting Against Climate Threats (PACT) initiative was launched via Governor Murphy's Executive Order No. 100 in early 2020, promising via NJDEP regulation to:

- Establish a greenhouse gas monitoring and reporting program to identify all significant sources of statewide greenhouse gas emissions, including carbon dioxide and short-lived climate pollutants, and monitor progress toward the limits set forth in New Jersey's Global Warming Response Act;
- Establish criteria to govern and reduce emissions of carbon dioxide and, where necessary, short-lived climate pollutants, including but not limited to, black carbon, hydrofluorocarbons, and methane; and
- Integrate climate change considerations, such as sea level rise, into all of NJDEP's regulatory and permitting programs, including but not limited to, land use permitting, water supply, stormwater and wastewater permitting and planning, air quality, and solid waste and site remediation permitting.

Commissioner McCabe's Administrative Order No. 2020-01 established aggressive timeframes for these and other PACT-related actions, and NJDEP embarked on significant stakeholder efforts in 2020 to address these directives. Initial rulemaking proposals are expected to address air emissions and land use issues, as discussed below.

### **Enhanced Greenhouse Gas Regulation – Stationary and Mobile Sources**

Stakeholder meetings were held throughout the year, with meetings in September and October focused on the development of regulatory standards for greenhouse gas emissions from various sectors, including utilities, the transportation sector, cargo handling, oceangoing vessels, and stationary sources. In a December stakeholder session, NJDEP previewed upcoming rulemakings that will be proposed in April 2021 which, according to the agency, are expected to include the following:

- **Electricity Generating Units (EGUs).** Existing fossil-fuel fired EGUs will be subjected to CO<sub>2</sub> emission limits, expressed as an efficiency standard, that will ratchet down over time. New base load EGUs will be subject to a CO<sub>2</sub> emission limits based on rate achieved by the most efficient combined cycle units. New non-base load and modified EGUs will be subject to case-by-case review.
- **Commercial and Industrial Boilers.** NJDEP expects to work toward a phasedown of small fossil-fuel fired commercial and industrial boilers (< 5MMBtu/hr) via imposing permit conditions for permit approval and requiring boiler fleet owners to submit a boiler fleet report and replace small, older fossil-fuel combustion boilers with non-fossil fuel boilers.

- **Heavy Fuel Sales Ban.** NJDEP intends to institute a ban on the sale of No.4 and No.6 heavy liquid fuels, with an exception for marine vessels.
- **Advanced Clean Truck and Fleet Reporting.** California's rules applicable to Class 2b (delivery vans) and Class 8 (long haul tractor trailers) are expected to be adopted by reference, to include a manufacturer zero-emission truck sales requirement starting in model year 2025 in New Jersey and increasing through model year 2035. Reporting requirements for large fleet owners will also support future development of zero emission fleet purchase requirements and assess infrastructure needs.
- **Low NOx Rule.** NJDEP also expects to adopt by reference the California Medium and Heavy-Duty Vehicle Omnibus Rule and establish stricter NOx limits for some medium-duty and all heavy-duty engines and vehicles, taking effect in model year 2025. The rule includes longer warranty requirements to ensure that future emissions controls are covered by the manufacturer using original manufacturer parts.
- **Medium-Duty Vehicle Inspections.** This expected rule will establish standards and test procedures for inspections of Class 2b through Class 5 medium-duty diesel vehicles (such as large pickup trucks, step vans and delivery trucks).
- **Cargo Handling Equipment.** California's diesel fleet modernization rule will be adopted by reference to require existing diesel-powered cargo handling equipment at ports and intermodal rail yards to upgrade to cleaner technology and require that new purchases meet the tightest standards (i.e. Tier 4), likely phased in starting in 2023. Required transition to full electric will be considered for a future rulemaking, as will a requirement for the provision of shoreside power for oceangoing vessels.

### **Land Resource Regulation – Sea Level Rise and Inland Flooding**

NJDEP has also been active in the stakeholder process to incorporate climate change considerations into its land resource protection rules, with new proposed regulations anticipated to be published as early as the first quarter of 2021. The primary focus of NJDEP's PACT land use regulations will be on addressing the impact of sea level rise and more extreme rainfall events associated with climate change, as NJDEP estimates that approximately 35 percent of the state's land area is subject to flooding, including in already heavily developed areas of the state. The following land resource protection programs are expected to be impacted by regulatory changes as announced by the agency at a December stakeholder session:

- **Flood Control.** NJDEP is currently considering proposing a variety of new regulations aimed at mitigating the impact of sea level rise and flooding concerns, that will likely cut across multiple land development regulatory programs.
  - **"Inundation Risk Zone"** - The potentially most significant new regulation is the development of an "Inundation Risk Zone," consisting of land beyond current floodplain boundaries that is mostly dry, but that is expected to be inundated daily by tidal waters or permanently by the year 2100. It remains unclear precisely how NJDEP intends to utilize or implement the

- Inundation Risk Zone into its regulatory permitting and compliance programs – but the potential ramifications for coastal development in New Jersey could be significant, potentially limiting or imposing new requirements on development in these areas that make development impractical, or possibly affecting landowners' ability to acquire flood hazard insurance for their properties.
- **“Coastal Buffer Zone”** – NJDEP is also considering proposing a new “coastal buffer zone” consisting of area adjacent to beaches, dunes, or coastal bluffs along the Atlantic Ocean or the Delaware Bay/River that is vegetated, and that acts as a transition between the coastal area and upland development. The “coastal buffer zone” would overlap with the “inundation risk zone” but with differing regulatory goals - the “coastal buffer zone” will focus on increasing the width of beaches and use of dunes to buffer upland development from coastal hazards and flooding.
  - **Adjustment of Floodplains and Flood Hazard Areas** – NJDEP has also suggested that it will propose an adjustment of the 100-year floodplain to make it reflect expected future conditions, rather than historic flood levels (which is the current basis for FEMA floodplain mapping), and which forms the basis for many land development protocols and restrictions in tidal and fluvial areas.
    - **Tidal areas** - NJDEP is considering creation of a “Climate Adjusted Flood Elevation,” that will expand the tidal flood area by adding an additional 5 feet to the FEMA 100-year flood elevation
    - **Fluvial Areas** – NJDEP is considering two options: (1) utilizing the FEMA 500-year flood elevation to require design flood plus 2 feet, or the FEMA 100-year flood elevation plus 3 feet; or (2) calculating the flood hazard area limits using hydrologic and hydraulic calculations based on 125 percent of the 100-year storm.
  - **Elevation Standards** – NJDEP is looking to require that new residential and critical infrastructure will require the first floor to be constructed 1 foot above the new “Climate Adjusted Flood Elevation.”
  - **Rebuilding requirements** – NJDEP has also proposed potentially more stringent requirements to rebuild or reconstruct property damaged by flooding that will require more than NJDEP’s current restrictions, and which prohibit any habitable space below the FEMA 100-year flood elevation.
  - **Stormwater Management.** NJDEP is considering amending the threshold for what is considered to be “major development” that triggers stormwater management planning and permitting requirements and is also considering adopting new standards to apply to redevelopment projects that reconstruct impervious surfaces on a property.

- **Dam Safety.** NJDEP is also expected to publish proposed regulations to increase the freeboard height requirements for dam construction under NJDEP’s Dam Safety Standards, likely doubling the current requirement from one foot to two feet.
- **Permits-by-Registration.** NJDEP is proposing to replace “permits-by-rule” by a “permits-by-registration” system, that would allow NJDEP to better track cumulative impacts and address standards in impaired watersheds. It is currently unclear which permits-by-rule would be converted to permits-by-registration, or whether current permits-by-rule will be converted into general permits.

As these multiple examples from just NJDEP’s air and land use regulatory programs demonstrate, NJDEP is set to roll out potentially significant PACT-related changes in 2021. Affected industry sectors should monitor and track the PACT initiative as it progresses into the rulemaking phase, evaluate the potential impact of new regulations, and provide input to NJDEP during applicable comment periods.

## **2021 Impact of NJDEP 2020 C-1 Water Quality Designations for Additional Waterways**

***Diana A. Silva, Esq.***

In April 2020, NJDEP finalized the reclassification of 600 miles of rivers and streams to Category 1 or “C1” status – which is the second highest antidegradation classification of a water body under NJDEP’s surface water quality regulations, and which requires that the water be “protected from any measurable change in water quality” because of its “exceptional significance” to ecological values, recreational uses, water supplies, or fisheries resources. This was the first reclassification of state rivers and streams since 2008.

The newly reclassified rivers and streams cut across 67 different municipalities, and multiple counties, including, but not limited to the Cooper River in Camden County; Woodbury Creek and Still Run in Gloucester County; the Salem River in Salem County; the Cohansey and Maurice Rivers in Cumberland County; the South Branch of the Raritan River in Somerset and Hunterdon Counties; Jacobs Creek in Mercer County; Tuckerton and Westecunk Creeks in Ocean County; the Pequest River in Warren County; and the Ramapo River in Bergen County.

This reclassification will affect permitting across multiple industrial and commercial sectors in 2021 – particularly as development and capital projects ramp up as the economy reopens after COVID-19. Existing projects may need to reevaluate the impact of their activities as well. For example, wastewater discharges into C1 waters must meet more stringent water quality standards, which will impact existing and newly proposed discharges to these waterways. In addition, C1 waters and all upstream tributaries also have a 300-foot riparian zone land development buffer requirement on either side of the waterway under the Flood Hazard Area Control Act regulations, that may further restrict any planned land development projects, including infrastructure projects, located near these newly-designated water bodies.

## **New Jersey in Forefront in Regulation of PFAS Despite Ongoing Legal Challenge**

***Nicole R. Moshang, Esq.***

[As noted elsewhere in this Forecast](#), the New Jersey Department of Environmental Protection (NJDEP) adopted ground water quality standards (GWQS) and maximum contaminant levels (MCLs) effective June

1, 2020, for two of the most prominent per – and polyfluoroalkyl substances (PFAS): perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS). These new standards (0.014 ug/L for PFOA and 0.013 ug/L for PFOS) bring these emerging contaminants under much of the same regulatory umbrella already established in New Jersey for another PFAS chemical, perfluorononanoic acid (PFNA) and continues to secure New Jersey's spot as one of the most proactive states in the regulation of PFAS contaminants. Indeed, New Jersey's standards, as discussed below, are significantly lower than the recommended guidance set by the United States Environmental Protection Agency (EPA) of a screening level of 0.04 ug/l and Lifetime Drinking Water Health Advisory level of 0.07 ug/l, placing New Jersey well ahead of a growing national trend of states that have begun to regulate PFAS.

New Jersey's efforts to regulate PFAS in ground water dates back to July 2015, when the New Jersey Drinking Water Quality Institute issued a recommended health-based MCL for PFNA of 0.013 ug/L. The recommendation served as the basis for NJDEP's adoption of an interim specific ground water quality standard of 0.01 ug/L for PFNA on November 25, 2015, and subsequent amendments to both NJDEP's GWQS and the Discharge of Petroleum and Other Hazardous Substances regulations to add PFNA to the list of Hazardous Substances (N.J.A.C. 7:1E) in January 2018. On September 4, 2018, NJDEP amended the MCL for PFNA in the GWQS rules to 0.013 ug/L, consistent with the newly established MCL for PFNA of 0.13 ug/L.

The recent adoption of standards and MCLs for PFOA and PFOS has similarly generated amendments to various environmental regulations, including adding both as Hazardous Substances under the Discharge of Petroleum and Other Hazardous Substance rules (N.J.A.C. 7:1E), and amending the GWQS (N.J.A.C. 7:9C), the Private Well Testing Act rules (N.J.A.C. 7:9E), the Safe Drinking Water Act rules (N.J.A.C. 7:10), and the New Jersey Pollutant Discharge Elimination System rules (N.J.A.C. 7:14A). Finally, the newly adopted GWQS also become ground water remediation standards (N.J.A.C. 7:26D-2.2(a)).

The adoption of the new standards should not come as a surprise however, and in fact many sites likely already considered their impact in ongoing site remediation in response to NJDEP's adoption of interim specific groundwater quality standards for PFNA back in 2015 and PFOA and PFOS in March of 2019. Indeed, under the Technical Requirements for Site Remediation (N.J.A.C. 7:26E), in evaluating a contaminated site, LSRPs were already required to consider whether there were any historic or current use of emerging contaminants, which include PFNA, PFOA and PFOS, regardless of whether the contaminant is listed as a hazardous substance. This evaluation would have to be documented in the preliminary assessment for the site and, where such substances are documented, could lead to a site or remedial investigation of groundwater and possible remedial action. [See [NJDEP's website for details on Emerging Contaminants](#)].

The ultimate fate of the new PFOA and PFOS standards remains uncertain. A coalition of public utilities, businesses and trade and business associations filed a petition with the New Jersey Appellate Division on October 1, 2020, arguing that NJDEP did not comply with the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-1 *et seq.*, in adopting the PFOA and PFOS regulations, and further that the standards are arbitrary and capricious and not based on sound and rational scientific evidence. The coalition's petition also sought immediate relief in the form of a stay of the regulations pending the Appellate Court's full review of the legal challenges presented. On January 4<sup>th</sup>, 2021, the Appellate Division issued a one-page order denying the requested stay, leaving some doubt on whether the Appellate Division's decision on the merits will change course. A decision on the merits of the challenge could come in 2021.

## **New NJ Brownfields Tax Credit Program Enacted Under Economic Recovery Act of 2020** ***Bruce S. Katcher, Esq.***

At the end of 2020, the legislature passed and on January 7, 2021, Governor Murphy signed into law a massive new economic development law – the Economic Recovery Act of 2020. Among the variety of new economic development incentives is the Brownfields Redevelopment Incentive Program Act (BRIPA), which provides for the awarding of tax credits to brownfields developers to promote the redevelopment of brownfields in New Jersey.

Under BRIPA, an eligible developer (i.e., one not responsible for the contamination) of a redevelopment project may submit an application to the Economic Development Authority (EDA) and NJDEP for approval of tax credits to compensate for remediation costs, including both the cost of remediating soil and groundwater and also the cost of addressing contamination in building structures (e.g., asbestos, lead paint PCBs, etc.).

To be eligible, the project must have a project financing gap – meaning that the developer has contributed at least 20 percent of the project's capital itself and the project has a capital shortfall that cannot be satisfied from other sources. The developer must also demonstrate that the project is not economically feasible without the credit, the municipality will provide a letter of support, workers will be paid prevailing wage and, with limited exceptions, remediation (except for preliminary assessment and investigative work) has not yet commenced.

Applications will be reviewed by EDA (in consultation with NJDEP) through a competitive process and a variety of factors may be considered as part of that process. Among those factors is whether the project reduces environmental and public health stressors in an overburdened community, another reflection of the state's commitment to apply environmental justice principles.

The remediation may be performed under a memorandum of agreement or other oversight document with the NJDEP or pursuant to the NJDEP's LSRP program. Once the application is approved by EDA and prior to starting remediation, the developer must enter into a redevelopment agreement with EDA. The agreement will specify the amount of the credit, the date of completion for the remediation, the project remediation cost and require six-month progress reports. Conditions include compliance with EDA's affirmative action requirements and green building standards, A labor harmony agreement may be required for certain retail and distribution establishments in the project and NJDEP is subrogated to the rights of the developer to recover any remediation costs from third parties. The credits are transferable one time.

A total of up to \$50 million per year in credits is available through the first six years of the seven-year program. Credits will be awarded in an amount not to exceed 40 percent of actual remediation costs, 40 percent of projected remediation costs as set forth in the redevelopment agreement, or \$4 million, whichever is least.

The above summary only begins to scratch the surface of this new program, and full implementation will have to await the promulgation of new regulations - an expedited process of temporary regulations is provided under the law; however, it appears likely that BRIPA will generate a lot of interest among brownfields redevelopers in 2021 as they consider how to factor the new incentives into their plans.

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