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## AN ENVIRONMENTAL AND ENERGY LAW PRACTICE

### 2023 Environmental and Energy Law Forecast

#### PENNSYLVANIA

##### Shapiro Administration Policy on Energy and the Environment

*Robert D. Fox, Esq.*

Governor Shapiro's overriding perspective is as follows: He "refuses to accept the false choice between protecting jobs or protecting our planet – we must do both." Within that framework, he supports the following:

- Ensuring that Pennsylvania has a comprehensive climate and energy policy that will invest in clean energy, including promoting solar projects and adopting measures to increase access to renewable energy sources.
- Working with stakeholders to demonstrate the best way to move forward to update Pennsylvania's Alternative Energy Portfolio Standards Act to set a target to generate 30 percent of Pennsylvania's energy from renewable sources by 2030 and set a goal for Pennsylvania to reach net-zero emissions by 2050.
- Investing in plugging abandoned well across the state to curb emissions.
- Investing in zero-carbon technology and providing financial incentives to help bring zero-carbon technologies to commercial readiness.
- Investing in research, development, and design for advanced renewables, advanced nuclear, hydrogen, carbon capture, and other zero-carbon technologies.
- Steering clean energy and infrastructure investments to underserved communities.
- Expanding weatherization assistance programs and energy efficiency projects for families and small businesses throughout the Commonwealth.
- Ensuring that while implementing these policies, Pennsylvania remains an energy hub as one of the most important energy-producing states in the entire country. The Commonwealth is the second largest natural gas producing state in the nation and the largest electricity exporter in the entire country.

##### Environmental Rights Amendment Trends Entering 2023

*Diana A. Silva, Esq., Thomas M. Duncan, Esq., and Danielle N. Bagwell, Esq.*

In recent years, Pennsylvania courts have grappled with numerous challenges to local ordinances as violating Article I, Section 27 of the Pennsylvania Constitution, known as the Environmental Rights Amendment (ERA). In 2022, the Pennsylvania Commonwealth Court appeared to settle on the application of a balancing test that assesses whether the challenged governmental action unreasonably impairs the

values enumerated in the ERA. In practice, this standard constitutes a high bar to ERA-based challenges, which may dissuade potential plaintiffs from bringing ERA-based challenges to local ordinances in the future.

For decades, Pennsylvania courts applied a three-factor balancing test to ERA-based challenges, first enunciated in *Payne v. Kassab*, 361 A.2d 263, 246 (Pa. 1976). In 2017, the Pennsylvania Supreme Court, in *Pa. Env'tl. Defense Found. v. Commonwealth*, 161 A.3d 911 (Pa. 2017) ("*PEDF II*"), held that local and state government agencies have an obligation under the ERA to act as trustees for the environment and the natural resources of the state, and as such must prohibit their degradation and affirmatively act to protect them. In so holding, the Court effectively struck the decades-old *Payne v. Kassab* three-part test.

In 2017, the Court applied a new standard to regulatory challenges in *UGI Utilities, Inc. v. City of Reading*, 179 A.3d 624 (Pa. Cmwlth. 2017), a case in which the City of Reading argued that a local ordinance could not be preempted because "it implicates its protection of historic resources under Article I, Section 27 of the Pennsylvania Constitution." The court disagreed, holding that the ERA "does not immunize local regulation from preemption" and making clear that "Article I, Section 27 can bar preemption of a local regulation" only where the "statute or regulation on which preemption is based so completely removes environmental protections that it violates the state's duties under that constitutional provision."

The following year, in *Frederick v. Allegheny Twp. Zoning Hearing Bd.*, 196 A.3d 677 (Pa. Cmwlth. 2018), the Commonwealth Court upheld a zoning ordinance that rendered oil and gas development a permitted use by right in all zoning districts. A plurality of the court explained that municipalities do not have affirmative duties under the ERA but further held that when the government acts, "it must reasonably account for the environmental features of the affected locale..." The court explained that a "municipality may use its zoning powers only to regulate where mineral extraction takes place," but a "municipality does not regulate how the gas drilling will be done." Applying a two-step test which differed from the standard applied in *UGI Utilities*, the court held it must "determine, first, whether the values in the first clause of the [ERA] are implicated and, second, whether the governmental action unreasonably impairs those values." Ultimately the court upheld the ordinance, holding plaintiffs had failed to prove the zoning ordinance unreasonably impaired the natural, scenic, historic, and esthetic values of the municipality's environment, crediting expert testimony showing a long history of oil and gas development safely coexisting with agricultural uses in the township.

The Commonwealth Court subsequently applied the *Frederick* test in several decisions to uphold other local ordinances, including one case this year, finding that they did not "unreasonably impair" individuals' rights under the ERA. See *Delaware Riverkeeper Network v. Middlesex Twp. Zoning Hearing Bd.*, No. 2609 C.D. 2015, 2019 WL 2605850 (Pa. Cmwlth. June 26, 2019) (unreported); *Protect PT v. Penn Twp. Zoning Hearing Bd.*, 220 A.3d 1174 (Pa. Cmwlth. 2019); *Murrysville Watch Committee v. Municipality of Murrysville Zoning Hearing Board*, No. 579 C.D. 2020, 2022 WL 200112 (Pa. Cmwlth. Jan. 24, 2022) (unreported).

The court also subsequently fleshed out the *UGI Utilities* standard with respect to challenges to regulations. In *City of Lancaster, et al. v. Pa. Pub. Util. Comm'n*, No. 251 MD 2019 (Pa. Cmwlth. Feb. 21, 2020) (unreported), which involved a challenge to the same regulation at issue in the *UGI Utilities* case, a group of municipalities argued that the ordinance failed to sufficiently protect historic resources under the ERA. The Court held that the Pennsylvania Public Utility Code preempted any local regulation or ordinance that falls within the ambit of that field. The court, citing to *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa.

2013), also stated 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, citing the standard in *UGI Utilities*, ultimately dismissed the municipalities’ challenge, finding that they failed to establish that the regulation unreasonably degraded historic values protected under the ERA.

In November 2022, in *Pa. Env’tl. Defense Found. v. Commonwealth*, No. 447 M.D. 2021, 2022 WL 16752900 (Pa. Cmwlth. Nov. 8, 2022), the Commonwealth Court dismissed an ERA challenge to a legislative enactment that authorized snowmobile use on state lands. While the plaintiffs made general factual allegations that ATVs are noisy and degrade the environment, the court found the conclusory allegations insufficient. The Court stated that, “[t]o succeed in its facial challenge, the Foundation must show that the statutes in question cannot be valid under any set of circumstances,” and that, on their face, the statutes “meet the standards set forth in *PEDF II* and *Robinson Township*.”

The Commonwealth Court will continue to fine-tune the standard for ERA-based challenges, with several important cases to be heard on appeal in 2023. Looking ahead to 2023, given the heightened standards applied by the Commonwealth Court, plaintiffs may be dissuaded from bringing ERA-based challenges to local ordinances without being prepared to demonstrate via scientific and expert evidence the alleged environmental degradation the ordinance would cause.

## **Pennsylvania’s Climate Change Initiatives Entering 2023**

***Thomas M. Duncan, Esq., Brandon P. Matsnev, Esq., and Technical Consultant Michael C. Nines, P.E., LEED AP***

In 2022, Pennsylvania advanced significant regulatory and executive initiatives, the fate of which will be decided in 2023. Some of these actions focus on greenhouse gases (GHGs) generally, while others are more specific to particular GHGs, such as CO<sub>2</sub> or methane.

### **Regional Greenhouse Gas Initiative (RGGI)**

In 2022, the Pennsylvania Commonwealth Court enjoined a final rulemaking titled “CO<sub>2</sub> Budget Trading Program,” which would have allowed Pennsylvania to join as the newest member of the Regional Greenhouse Gas Initiative (RGGI). The rulemaking remains enjoined while litigation proceeds in the Pennsylvania appellate courts. The courts are likely to decide the rulemaking’s fate in 2023.

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. The rulemaking would aim to reduce CO<sub>2</sub> emissions from RGGI sources by 25.5 percent between 2022 and 2030. Based on an analysis conducted by a consultant retained by the Pennsylvania Department of Environmental Protection (PADEP), most emission reductions are expected to come from reductions in coal use, while a smaller percentage would come from natural gas. Pennsylvania itself would expect to see a total statewide emissions reduction of 183 million tons of CO<sub>2</sub> by 2030, but 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 12 other states, and the District of

Columbia. Specific to natural gas, nearly all the anticipated reductions in natural gas emissions and generation in Pennsylvania are expected to be leaked to other PJM states.

PADEP expects the auctions of RGGI credits to yield hundreds of millions of dollars in revenues 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,” and PADEP would intend to develop a reinvestment plan for the auction revenues including reinvestment in energy efficiency, renewable energy, and greenhouse gas abatement. Although PADEP has taken the position that the allowances amount to fees that are authorized under the Air Pollution Control Act, opponents of the final rulemaking argue that the anticipated revenue from the auctions exceeds an authorized fee and instead amounts to an unauthorized tax.

A number of members of the Pennsylvania General Assembly, unions, and powerplants appealed the rulemaking to the Commonwealth Court and sought an injunction. On July 8, 2022, the Commonwealth Court issued an order enjoining the implementation of the rulemaking. In its opinion, the Court suggested that PADEP and the Environmental Quality Board had the authority under the Air Pollution Control Act to issue the rulemaking, but the Court ultimately suggested that the RGGI allowance auction proceeds amounted to an unauthorized tax. PADEP appealed that decision to the Pennsylvania Supreme Court (Docket Nos. 79 MAP 2022 and 80 MAP 2022). That appeal has been briefed and should be scheduled for argument in 2023. Meanwhile, on November 16, 2022, the Commonwealth Court held en banc argument on cross-motions for summary relief, and a decision on those motions is expected in 2023.

### **Methane Emissions**

During 2022, PADEP had a rocky road of sorts with respect to implementation of two rulemakings related to reduction of volatile organic compound (VOC) emissions from both conventional and unconventional oil and gas operations. The rulemakings, one of which was issued as an emergency regulatory action on November 30, 2022, seek to simultaneously target significant methane emissions from the oil and gas industry. Sources subject to regulation include natural gas-driven continuous bleed pneumatic controllers, natural gas-driven diaphragm pumps, reciprocating compressors, centrifugal compressors, fugitive emissions components and storage vessels installed at conventional well sites, gathering and boosting stations and natural gas processing plants, as well as storage vessels in the natural gas transmission and storage segment. These regulations require operators to identify and stop leaks in their equipment that can allow methane and VOCs to escape into the atmosphere. While the regulations specifically target VOCs, PADEP believes that by reducing leaks of natural gas from wells and pipelines, that it will ensure a significant reduction of methane emissions as a co-benefit.

PADEP was required to adopt reasonably available control technology (RACT) requirements and RACT emission limitations for conventional and unconventional oil and natural gas sources in order to address VOC emission limitations and other RACT requirements consistent with the United States Environmental Protection Agency’s (EPA) recommendations in the 2016 “*Control Techniques Guidelines for the Oil and Natural Gas Industry*,” (2016 Oil & Gas CTG), which addresses control requirements to meet the 2008 and 2015 ozone National Ambient Air Quality Standards. The regulations incorporating the requirements of the 2016 Oil & Gas CTG were originally required to be incorporated into the Commonwealth’s State Implementation Plan (SIP) by June 16, 2022 in order to avoid imposition of federal sanctions under the Clean Air Act.

Of note to the rulemaking process, PADEP originally proposed a final rulemaking, which contained regulations applicable to both conventional and unconventional oil and natural gas sources of VOC emissions. However, after the final rulemaking was submitted to the Independent Regulatory Review Commission (IRRC) for final consideration, the House Environmental Resources and Energy Committee voted to send a letter to IRRC disapproving the regulation. The Committee's primary concern centered on language in Act 52 of 2016, which the Committee believed required DEP to submit two rulemaking packages – one that applies only to conventional oil and natural gas sources and the other which would cover all other sources in the rulemaking.

Thus, PADEP embarked upon splitting the rulemaking into two separate rules. Due to the delays in the rulemaking processes and splitting of the rulemaking into two separate rules, the Commonwealth was subject to federal sanctions as of June 16, 2022, which included an increase in emission reduction offset ratios (from 1.3:1 to 2:1) for regulated facilities triggering non-attainment New Source Review permitting. A second more substantial deadline loomed for the imposition of federal highway funding sanctions (estimated at over \$800 million) in the event that PADEP did not finalize the regulations and submit a SIP revision by December 16, 2022. Thus, the PADEP worked feverishly through the regulatory processes, which culminated in the final rulemakings being published on December 10, 2022, and subsequent submission of a SIP revision to the EPA on December 12, 2022.

EPA lifted offset sanctions and staved off what could have been a disastrous imposition of federal highway funding sanctions that were set to otherwise take effect on December 16, 2022. Implementation of the two oil and gas rulemakings will continue in earnest moving forward.

### **Mobile Sources**

Last year, we reported that in October 2021, PADEP prepared a draft proposed rulemaking that would amend PADEP's Clean Vehicles Program at 25 Pa. Code Chapter 126, Subchapter D, by establishing a requirement for automakers that would adopt the California Air Resource Board (CARB) Zero Emission Vehicle (ZEV) program by adding a sales percentage requirement for Program-eligible light duty vehicles as part of their model offerings beginning for model year 2026 and requiring motor vehicle manufacturers to demonstrate compliance with the already adopted CARB greenhouse gas (GHG) fleet average requirement. During 2022, the proposed rulemaking did not advance beyond the advisory committee review stage and has yet to be presented to the Environmental Quality Board (EQB) for review and adoption. This proposed rulemaking no longer appears on PADEP's current regulatory agenda; however, this may be due to recent major amendments to CARB's *Advanced Clean Cars II* regulations, which require all new passenger vehicles sold in California to be zero emissions by 2035. Based on the changes in California, it appears that PADEP would need to propose a new rulemaking to incorporate all or part of California's low-emission and zero-emission vehicle regulations. Previously, PADEP indicated that it did not intend to eliminate the use of internal combustion engines. This will be one to watch closely during 2023.

## **Pennsylvania Adopts Maximum Contaminant Level for PFOA and PFOS in Drinking Water and EPA is Not Far Behind**

***Bryan P. Franey, Esq.***

On January 14, 2023, Pennsylvania adopted a final rule establishing a Maximum Contaminant Level (MCL) for perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS) in drinking water. The final rule establishes an MCL of 14 parts per trillion (ppt) for PFOA and 18 ppt for PFOS. Pennsylvania joins a growing list of states to adopt MCLs. By comparison, New Jersey has adopted slightly lower MCLs for PFOA (13 ppt) and PFOS (14 ppt). Pennsylvania's MCLs for PFOA and PFOS apply to all community, nontransient, noncommunity, and bottled, vended retail, and bulk water systems.

At the federal level, the Environmental Protection Agency (EPA) is also planning to establish MCLs for both PFOA and PFOS. EPA had hoped to propose MCLs for PFOA and PFOS by the end of 2022 with a final rule adopted by the end of 2023. In its recent Regulatory Agenda, EPA moved its target to publish a proposed MCL to March 4, 2023 and a final MCL to September 2024. To the extent that EPA's MCL is more stringent than Pennsylvania's MCL, Pennsylvania will likely have to adopt EPA's standard. To the extent there are other conflicts between the two MCL rulemakings, it is unclear how such conflicts will be resolved.

## **Act 2 Changes Anticipated in 2023**

***Jonathan H. Spergel, Esq. and Technical Consultant Will Hitchcock***

The Pennsylvania Department of Environmental Protection (PADEP) is working on several programmatic and regulatory changes to its Land Recycling Program, commonly known as Act 2. Some of these efforts will take effect in 2023, while others will likely not become effective until 2024.

Based on feedback received from the regulated community, PADEP is working to improve Act 2 report review times by hiring additional toxicologists, risk assessors, and chemists to assist with report review. Although Act 2 has specified statutory review periods, many in the regulated community have observed that, in recent years, the vast majority of report review times take nearly the entire statutory review period, often resulting in the issuance of technical deficiency or denial letters. PADEP is also working to improve consistency and standardize regulatory interpretation across regions by developing additional training materials, as well as a Q&A database that should be a helpful resource to remediators and regulators alike. Our firm will likely be involved in development of the Q&A database through participation in the Cleanup Standards Scientific Advisory Board (CSSAB), so if there is an issue you would like clarified, please [contact us](#) to discuss.

There are many anticipated changes to the Medium-Specific Concentrations (MSCs) that serve as cleanup targets for Act 2 Statewide Health Standards. First, the much-anticipated increase to the vanadium MSC is likely to take effect in the second quarter of 2023. The residential soil MSC for vanadium has been set at 15 mg/kg for several years, a concentration that is often below the naturally occurring content of vanadium in soils throughout Pennsylvania. This has created significant difficulties for Act 2 projects as well as other construction projects involving the movement of fill under the Clean Fill Policy. The proposed rulemaking has already been approved by the Environmental Quality Board and no adverse public comments were

received. When the final rulemaking takes effect, the residential soil MSC will increase to 1,100 mg/kg, providing substantial relief to many project sponsors.

PADEP and the CSSAB have been working on several other changes to Act 2 MSCs that will likely take effect in mid-2024. The interim Health Advisory Limits (HALs) for PFOA and PFOS in drinking water that were published by EPA in June 2022 are not anticipated to replace the current groundwater MSCs until they are published as final HALs. Until that time, the groundwater MSCs for PFOA and PFOS are likely to remain at 0.07 µg/L (for used and nonuse aquifers with TDS ≤ 2,500 µg/L). The final HALs for GenX and PFBS (0.01 and 2 µg/L, respectively) will be incorporated as Act 2 groundwater MSCs (for used and nonuse aquifers with TDS ≤ 2,500 µg/L).

As a result of updated biokinetic models for lead exposures to children, the current residential soil MSC for lead is likely to decrease significantly in mid-2024, from 500 to 200 mg/kg. However, the PADEP and CSSAB have recommended the use of an arithmetic average soil concentration to demonstrate attainment of the Statewide Health Standard, which is consistent with the intended use of the biokinetic model.

Other anticipated changes include a significant decrease to the soil MSC for cadmium due to updated toxicity information, slight changes to the MSCs for several Polynuclear Aromatic Hydrocarbons (PAHs) whose toxicity is benchmarked to that of benzo[a]pyrene, and a few other MSCs changes to compounds where EPA has recommended the use of sub-chronic instead of chronic toxicity values. At this time, PADEP is finalizing the regulatory text for presentation to the EQB, public comment, and adoption. Once a regulatory package is presented to the EQB, it often takes more than one year before it becomes an effective regulation.

## **Pennsylvania Reasonably Available Control Technology Requirements**

***Katherine L. Vaccaro, Esq.***

As we previously reported [here](#) and discussed on our podcast [here](#), PADEP has issued its new final regulations requiring the application of Reasonably Available Control Technology (RACT) by all major sources of NO<sub>x</sub> and VOC in Pennsylvania. The regulations are referred to as “RACT III,” because they are the third iteration of Pennsylvania’s RACT rule. The initial compliance deadline for RACT III, December 31, 2022, was the date by which all affected sources were required to submit to the Department their initial notifications, designating each source at the facility as either subject to RACT III or qualifying for a regulatory exemption. For non-exempt sources, the initial notification also needs to specify how the source will demonstrate compliance with the regulation – i.e., by meeting the applicable presumptive standards or seeking a source-specific determination of what constitutes RACT. Requests for such source-specific determinations, which are commonly referred to as “case-by-case proposals,” were due by January 1, 2023.

Although the first compliance dates are already passed, the exceptionally short period between the promulgation of RACT III in mid-November 2022 and the initial compliance deadline less than two months later does not appear to be lost on PADEP, as key program staff from Central Office have signaled, albeit informally, a seeming recognition that enforcement discretion may be necessary for delayed compliance. Still, facilities subject to RACT III should act fast to make the required submittals if they haven’t done so already. Please take a look at the links above for additional details on RACT III’s



presumptive standards, case-by-case proposals, including PADEP's "streamlined" option for certain sources subject to *RACT II*, emissions averaging for NOx, and other information.

## **Air Management Services Expected to Continue Advancement of Air Toxics Regulations Requiring Health Risk Assessments**

***Carol F. McCabe, Esq. and Technical Consultant Michael C. Nines, P.E., LEED AP***

As published in our [Special Alert](#) in May 2022 and subsequently updated, the City of Philadelphia's Air Management Services (AMS) is anticipated to continue advancement of a substantive rulemaking package into 2023 seeking revisions to existing Air Management Regulation VI *Control of Emissions of Toxic Air Contaminants* (the "AMR VI").

Under the proposed AMR VI, permit applicants seeking an air permit or license, or any permit renewal required by the AMS code (with limited exceptions) – including Title V renewals – would be required to determine whether their facilities have the potential to emit any one of the more than 200 listed air toxics in an amount above the designated pollutant-specific applicable threshold. If so, then an applicant would be required to conduct a health risk assessment for which AMS' "Risk Screening Workbook" may be used and must demonstrate that the proposed activity does not pose an unreasonable risk as compared to published inhalation reference values for the relevant air toxics. Notably, the proposed AMR VI would require AMS to review the existing air toxics concentrations surrounding an applicant's facility prior to acting on the permit application. Although the proposed rule language and supporting documents lack critical detail on how this assessment would be completed, this evaluation would suggest that AMS must account for, and make decisions based on, emissions generated by other emission sources, in addition to those emitted by the applicant source itself.

The proposed AMR VI rulemaking presumably caught many potentially regulated entities by surprise, as the rulemaking was published at the Department of Records with a date of final effectiveness by June 1, 2022, unless a public hearing was requested. Potentially impacted entities and those interested in the regulatory changes requested a public hearing in advance of the June 1 deadline. A virtual public hearing subsequently was held in August 2022, with formal written comments due to AMS by September 2022. We understand that a substantial number of comments were received by AMS and that the City is analyzing these submissions and will make a final determination as to whether or how the proposed AMR VI will need to be modified further to address the comments received. As for next steps, Section 8-407(c) of the Home Rule Charter requires that a report of the hearing be provided that either reaffirms the proposed regulations or modifies them with approval of the Law Department. Then the Department of Public Health will summarize the comments provided by each commenter (or in the case of written comments, incorporate the written comments), provide a short response to comments, and prepare a summary of the changes AMS intends to make to the proposed regulations and explanation of the reasons for the changes. It is unclear at this time if a modification of the proposed AMR VI will be subject to the same public notice and publication on the Department of Records website as the original May 2022 proposal, or whether the rule will simply be finalized without additional opportunity for comment.

Due to the scope of the proposed AMR VI rulemaking and potential inclusion of novel "cumulative" risk assessment approaches, AMR VI warrants close attention in 2023.



## **Amendments to Pennsylvania Stream and Wetlands Permitting Program and Changes to Mitigation Protocol on Hold; Future Uncertain**

**Todd D. Kantorczyk, Esq. and Diana A. Silva, Esq.**

At this time last year, the Pennsylvania Environmental Quality Board (EQB) was expected to finalize a proposed rulemaking in 2022 to amend the Pennsylvania Department of Environmental Protection's (PADEP) Chapter 105 regulations, which are the Commonwealth's wetland and aquatic resource permitting regulations. The proposed amendments would have amounted to the first substantive revisions to the Chapter 105 regulations in nearly 30 years. In the fall, however, PADEP indicated that the proposed revisions have been tabled indefinitely. Additionally, the corresponding technical guidance documents concerning Chapter 105 alternative analyses and trenchless technology for pipeline projects have been put on hold despite being published in draft for public comment in 2021 and 2022, with no indication as to when they may be finalized. It should be noted that while these documents are an outgrowth of a 2018 PADEP settlement with environmental groups over the Mariner East 2 pipeline project, under the terms of the stipulation, the decision to publish final guidance documents rests solely with PADEP and that decision is not subject to appeal.

Likewise, at the outset of 2022, PADEP announced that its draft Function-Based Aquatic Resource Compensation Protocol would become final guidance effective as of March 1, 2022. The new protocol was a significant departure from PADEP's previous method for determining the necessary compensation for losses of aquatic resources, which was based primarily upon acreage and linear feet. Implementation of the new protocol, however, was hampered by the absence of updated application forms and met with push back from affected entities, including mitigation banks and permittees such as PennDOT and the Turnpike Commission. As a result, PADEP quietly delayed full implementation of the protocol in 2022 and instead formed a stakeholder workgroup to reevaluate the protocol. And on January 7, 2023, PADEP announced that they were officially rescinding the final guidance "to reevaluate its effectiveness and review potential revisions through stakeholder outreach."

In short, the status of the significant updates to the Chapter 105 program expected in 2022 appear to be on indefinite hold, with the new schedule subject to the policy priorities of the incoming Shapiro administration.

## **Pennsylvania Commonwealth Court Finds Local Stormwater Charge Constitutes a Tax Not a Fee for Service**

**Diana A. Silva, Esq., Danielle N. Bagwell, Esq., and Technical Consultant Michael C. Nines, P.E., LEED AP**

On January 4, 2023, the Pennsylvania Commonwealth Court in *Borough of West Chester v. Pa. State System of Higher Education and West Chester University of Pa. of the State System of Higher Education*, No. 260 M.D. 2018 (Pa. Cmwlth. Jan. 4, 2023), ruled that a stormwater charge enacted by the Borough of West Chester was not a fee for service, but rather a local tax, and therefore could not be charged to West Chester University, a tax-exempt state university. The decision also rejected the use of impervious surface area coverage as a measure of the respective burden (and corollary benefit) that municipal stormwater systems provide to the given properties that are charged stormwater fees. This is the first decision in Pennsylvania to squarely evaluate stormwater charges that many municipalities and municipal authorities throughout the Commonwealth of Pennsylvania are currently charging to residential and commercial

property owners, which were enacted largely as an effort to help fund improvements to the municipal separate storm sewer systems and to meet related regulatory obligations. The impact of this decision will have major implications throughout Pennsylvania, where over 50 municipalities or municipal authorities are currently charging stormwater fees, and many others have announced they are planning to do so in the future. For more information, please see our comprehensive review of this very important case, [which is available here](#).

## **PADEP Reissues PAG-03 General Permit for Industrial Stormwater**

***Michael Dillon, Esq. and Technical Consultant Will Hitchcock***

On [December 24, 2022](#), PADEP published the [renewed PAG-03 general permit for stormwater discharges associated with industrial activity](#). The new permit goes into effect on March 24, 2023, and the existing permit expires at that time. Existing PAG-03 permit holders will need to submit a Notice of Intent (NOI) for coverage under the renewed PAG-03 before March 23, 2023, to maintain permit coverage and authorization to discharge stormwater. Permittees will also need to update and submit their Preparedness, Prevention, and Contingency (PPC) Plans to the PADEP as part of their NOI packages.

The NOI includes a requirement to report existing analytical data for the past two years for existing permittees, and to collect new data for pollutants that are considered the cause of impairment to waters receiving stormwater, as PADEP claims this information may be used to determine if the applicant is causing or contributing to the impairment for eligibility purposes. Applicants for renewal will need to act quickly to determine if additional sampling and analysis needs to be performed prior to the NOI due date of March 23, 2023.

Additionally, the PADEP added a requirement to report details on structural best management practices (BMPs), such as post-construction stormwater management practices, and the amount (in acres) of impervious area each BMP treats. Permit applicants are encouraged to secure relevant design information for structural BMPs sooner rather than later from their respective design engineers where practicable.

Finally, please note that facilities that are currently exempted from stormwater permitting through a No Exposure Certification (NEC) will maintain status under their existing NEC, which will remain valid until the expiration date identified on PADEP's approval letter. Facilities wishing to maintain their NEC status beyond the expiration date are required to apply to renew the NEC no later than 180 days prior to the expiration date of the NEC.

The renewed permit is substantially similar to the existing PAG-03, with a few notable changes. The new PAG-03 now requires monitoring for Total Nitrogen and Total Phosphorus in all covered industrial sectors. The new permit also specifies Target Quantitation Levels (TQLs) for many monitoring parameters that must be met or exceeded by the laboratory performing the analysis. There is an additional, expanded Corrective Action Plan process that takes effect when a facility has four or more consecutive benchmark exceedances at a monitored outfall. The new process requires a more systematic and thorough evaluation of stormwater BMP alternatives than the existing process, which begins after two or more benchmark exceedances. There are also new requirements for managing certain authorized non-stormwater discharges as well as valve-controlled discharges from stormwater retention structures.

Covered facilities should review the new permit and discuss the new monitoring requirements and TQLs with their laboratory and/or consultant performing stormwater monitoring. Prior to submitting the NOI for renewed PAG-03 coverage, facilities are also required to update their existing PPCs Plans to conform with the new permit.

## **Philadelphia LNG Export Task Force Act Becomes Law** ***Shoshana (Suzanne Ilene) Schiller, Esq.***

On November 3, 2022, Governor Wolf signed into law the Republican-sponsored Philadelphia LNG Export Task Force Act. The Act creates a Task Force to identify and examine the economic feasibility and impact, as well as obstacles, involved with making the Port of Philadelphia a Liquefied Natural Gas (LNG) export terminal. The Task Force, which will be comprised of a wide variety of industry players, would also identify potential partners in developing an LNG terminal in Philadelphia. The passage of the Act and the work of the Task Force bodes well for the future of Philadelphia, and Pennsylvania, in becoming a leader in LNG exports.

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